83-861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE CITY OF COLUMBUS, a consolidated municipal government; J. R. ALLEN, Mayor (deceased); A. J. McCLUNG, Mayor Pro Tem; JOSEPH W. SARGIS, Director of Public Safety; LEONARD LEAVELL and HUGH BENTLEY, Members Police Hearing Board; B. F. McGUFFEY, Chief of Police; and S. W. BROWN, Assistant Chief of Police,

Petitioners,

versus

ROBERT LEONARD; WILLIE L. PEARSON, JR.; VINSON WILLIS; JOHN H. CLARK, JR.; GARY L. SMITH; and FREDDIE L. WHITE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Does a municipality have a sufficient governmental interest in prescribing an American flag emblem as a part of the uniform issued to the members of its police department so as to allow dismissal of officers who publicly remove and publicly refuse to wear such insignia, and did the Court of Appeals err in concluding or implying that a resolution enacted by a governing authority and imposing such a uniform regulation is unconstitutional? Yes!

(This question alone should prompt the Supreme Court to issue a writ of certiorari because it suggests that the Court of Appeals decision is directly contrary to *Kelley v. Johnson*, 425 U.S. 238 (1976) -- a case to which the Court of Appeals opinion does not even allude either in its text or in its footnotes; the Question also affords an opportunity to decide to what extent the application of the First Amendment in the military context shall also apply to a para-military or quasi-military police department.)

2.

Does the conduct of subordinate police officers who, on May 31, 1971, in front of Police Headquarters and within the recording of television and other news media, remove the American flag from their uniforms, and who state that they have no intention of wearing the emblems in the future until their superiors treat them in a manner that the subordinates deem appropriate, constitute symbolic speech protected by the First Amendment so as to insulate them from removal for conduct unbecoming to officers contrary to good order and discipline and so as to make both public officials and a municipal corporation liable for damages

under 42 U.S.C. §1983? No!

(This question represents issues similar to those in *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983), cert. *granted*, Oct. 3, 1983 (Supreme Court No. 82-1998), and it affords the Supreme Court an opportunity to affirm the continuing validity of *United States v. O'Brien*, 391 U.S. 367 (1968) - - which, like *Kelley*, also does not appear anywhere in the opinion below; it also raises questions as to whether or not plaintiffs attempted to exercise First Amendment rights in an appropriate time, place, or manner.)

3.

Did the Court of Appeals err in concluding that, under the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968) (which involved the dismissal of a school teacher who wrote a letter to the newspaper criticizing the Board's allocation of financial resources between educational and athletic programs and charging the school superintendent with attempting to prevent teacher opposition to a proposed bond issue), the conduct of the seven police officers was protected by the First Amendment - - even though the District Court explicitly held (The Court of Appeals agreed with the trial judge's findings of facts: "We reach our conclusion, however, without disagreement as to the facts as found by the court below." (Footnote 4)) that they "had for weeks prior to May 31 been making public comment and holding press conferences and issuing press releases stating their grievances and criticizing the City Government in general and the Police Department in particular and no coercive action had been taken by anyone connected with the City Government to stifle the criticism, and . . . were allowed to conduct their picketing activities on the side-

walk and display their placards in front of the Police Headquarters for three days without hindrance" and that the May 31, 1971 deliberate cutting of the flags from their uniforms and the public announcement that each would not wear it again "was a calculated show of contempt for the City authority and a demonstration of refusal to obey its lawful ordinances, rules and commands" (District Court Opinion, Appendix Page A-10)? Yes!

(This question affords the Supreme Court an opportunity to define the relationships between District Courts and Courts of Appeal in First Amendment cases: To what extent do First Amendment questions involve law or fact? To what extent does the "clearly erroneous" rule govern the outcome of an appeal? To what extent may an appellate panel make a de novo determination?)

4.

Did the Court of Appeals err in imposing the burden-shifting test of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) in a case where the trial occurred nearly two years prior to the *Mt. Healthy* decision, where the decision on the merits was made without the necessity of re-opening the case for further evidence because the District Court concluded that no First Amendment violation constituted a substantial factor in the dismissals, and where the *only* due process issue *ever* raised by the never-amended June 18, 1971 Complaint was the May 31, 1971 summary dismissal for the "flag incident" and *not* the July 1971 hearings of the Police Hearing Board which heard numerous *other* allegations and upheld the dismissals? Yes!

Would not the *Mt. Healthy* rule shifting the burden of proof to a defendant *only* be fairly applied in situations where defendants' lawyer *knows* of the rule *and* defendants'

lawyer *knows* that a trial judge has ruled that a First Amendment violation has occurred (e. g., by denying a motion for directed verdict or a motion for summary dismissal), i.e. isn't such an application of *Mt. Healthy* required by fundamental due process for defendants? Yes!

5.

Did the Court of Appeals err by completely ignoring the considerable authority stemming from *Arnett v. Kennedy*, 416 U.S. 134 (1974) that a post-termination hearing cures the procedural infirmities of a summary dismissal and by completely failing to even acknowledge that this was an issue in the case, particularly when the *Fifth Circuit* Court of Appeals had remanded the case to the District Court with an unequivocal statement that the due process issue centered on alleged procedural defects of the May 31, 1971 summary dismissal (no hearing, no prior notice, no opportunity to respond, no confrontation, and no counsel: 551 F.2d 974, 976; Appendix A-77, and particularly when the *Eleventh Circuit* panel concluded during the course of the opinion now under review that the May 31 dismissals violated City regulations and the City Charter (which should have made it *mandatory* to consider the curative effect of the July 1971 Police Hearing Board hearings where Plaintiffs were represented by counsel)? Yes!

6.

By indiscriminately lumping all of the Defendants into one composite group, did the Court of Appeals ignore the rule in *Rizzo v. Goode*, 423 U.S. 362 (1976), requiring direct responsibility and a casual relationship between conduct and constitutional injury, and did the Court of Appeals compound this error by failing to even consider or mention the properly raised defenses of good faith and

official immunity as well as the question of how the City could be liable without retroactively applying *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978)? Yes!

LIST OF PARTIES

The Caption contains all of the parties to the proceedings in the Court of Appeals for the Eleventh Circuit.

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OPINIONS BELOW

The decision of the United States District Court for the Middle District of Georgia is not reported. The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 705 F.2d 1299 (1983). The decision of the United States Court of Appeals for the Fifth Circuit in the first phase of this case involving jurisdictional and abstention is reported at 551 F.2d 974, and the dissenting opinion on the denial of Certiorari from that decision is reported at

443 U.S. 905. The 1975 decision of the United States District Court for the Middle District of Georgia during the first phase of the case was not reported. All of these decisions are contained in the Appendices.

JURISDICTION

The original decision of the Court of Appeals for the Eleventh Circuit was rendered on May 23, 1983, and a Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 9, 1983. No extension of time within which to Petition for Certiorari has been requested, but a Stay of the Issuance of the Mandate was requested for the full ninety day period dated from September 9, 1983, and it was granted up to and including December 1, 1983. The various judgments and orders recited here are attached in the Appendices. The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment or decree of the Court of Appeals by writ of certiorari is 28 U.S.C. §1254(1) (62 Stat. 928).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

The following enumerated constitutional provisions, statutes, and ordinances are set out verbatim in the Appendices:

1. First Amendment to the United States Constitution
2. Fifth Amendment to the United States Constitution
3. Fourteenth Amendment to the United States Constitution
4. 42 U.S.C. §1981 (R.S. §1977)
5. 42 U.S.C. §1983 (R.S. §1979)
6. 28 U.S.C. §1331 (62 Stat. 930; 72 Stat. 415)
7. 28 U.S.C. §1343 (62 Stat. 932; 68 Stat. 1241; 71 Stat. 637)

8. 28 U.S.C. §2201 (62 Stat. 964; 63 Stat. 105; 68 Stat. 890; 72 Stat. 349)
9. 28 U.S.C. §2202 (62 Stat. 964)
10. Ordinance No. 71-1 of the Columbus Code
11. Ordinance No. 71-154 of the Columbus Code

STATEMENT OF THE CASE

Both the opinions of the District Court and the Court of Appeals contain factual statements, and the Court of Appeals rendered its decision after agreeing with the facts found by the trial judge. Further statements of facts can be found in the unpublished opinion of the trial judge which was written in 1975 during the first phase of this case involving jurisdictional and abstention issues (Appendix A-56), and in the opinion of the Court of Appeals for the Fifth Circuit which remanded the case for a decision on the merits (551 F.2d 974; Appendix A-45), and in the dissenting opinion of Justices Rehnquist and Blackmun and Chief Justice Burger upon the denial of a Writ of Certiorari from the Fifth Circuit (443 U.S. 905; Appendix A-37).

This case arises from certain events during the "Summer of 1971" in Columbus, Georgia, which produced litigation appearing in *Community Action Group v. City of Columbus,* 473 F.2d 966 (5th Cir. 1973), reh. den., 475 F.2d 1404 and *Sumbry v. Land,* 127 Ga. App. 786, 195 S.E.2d 228 (1972), cert. den., 414 U.S. 1079, both cases of which ended favorably to the City or to local officials. The unreported opinion of the District Court in the *Community Action Group* case is included here as Appendix A-79 because it records in great detail the significant unrest prevailing throughout this community in the summer of 1971. The exploits of two of the Plaintiffs, Gary L. Smith and Robert Leonard, are recorded in this 1972 opinion under incidents bearing their names (Leonard had some difficulty when a July 1971 parade

degenerated into violence, and Smith was arrested in July, 1971 in either actual or constructive possession of a 30-30 rifle which was noticed by Columbus police officers investigating an incident involving sniper fire.) Although none of the present six Plaintiffs can be said to have committed specific crimes, the Fifth Circuit Court of Appeals made the following general observation on the twelve individuals (four of whom are present Plaintiffs) who brought the *Community Action Group* Complaint: "There was substantial direct and circumstantial evidence that at least some of the plaintiffs were involved in the arson fires and that the false alarms and impediments placed in the way of the fire fighters, as well as the assaults made upon them, had a direct relationship to the demonstrations and civil unrest which the plaintiffs planned and executed." 473 F.2d 966, 974. All of these points should be made not only because they illustrate the problems which the officials of Columbus, Georgia had in governing the community following the flag incident of May 31, 1971, but also because they raise serious questions as to the feasibility of reinstating the Plaintiffs into positions of authority in the Columbus Police Department - - points which apparently escaped the members of the panel of the Eleventh Circuit.

The panel opinion very carefully describes and enumerates the various discussions and exercises of free expression which occurred prior to the May 31, 1971 flag incident, and this careful dating of events goes on into June of 1971. However, on page 1302 of the panel opinion when discussion of the events involves the meetings of the Police Hearing Board and the filing of this lawsuit, we find no more dates - - the apparent reason being that a complaint filed in June could hardly be regarded as questioning future events which occurred in July when the Police Hearing Board heard the flag incident charge as well as several other charges which are recited in Footnote 1 of the 1977 opinion of the Fifth Cir-

cuit Court of Appeals (Appendix A-49). The reader of the Eleventh Circuit opinion would think that the Complaint had been filed after the Board hearings: such timing would be absolutely necessary for there to be any justification for the further assumption that the Complaint addressed itself to constitutional infirmities in the Board hearings which in itself would be a necessary fact for the Eleventh Circuit to ignore the *Arnett v. Kennedy* rule allowing post-termination hearings to cure constitutional defects and for the Eleventh Circuit to invoke the *Mt. Healthy* balancing test between permissible and impermissible reasons for dismissals. The facts never happened that way, of course, and not one page of transcript nor one page of pleadings needs to be referenced in order to establish this fundamental stumbling block to the result which the Eleventh Circuit reached. The facts are all in the court decisions which have preceded this Petition for Certiorari, and it is simply inexplicable as to why they have been so obviously ignored.

This case originated as a Complaint by thirty-eight plaintiffs who asserted various claims of discrimination and mistreatment involving the City of Columbus Police Department. They enlisted the aid of the United States Justice Department, and their charges were found wanting. They enlisted the aid of the United States District Court, and they abandoned every claim contained in their massive Complaint except the single summary dismissal of seven officers on May 31, 1971 for the flag incident. They sought to muddle the 1975 trial of the flag incident with all of the various and sundry claims that they had so recently abandoned, and the only success which they have had in so confusing this narrow issue is embodied in the Eleventh Circuit opinion which is now the subject of this Petition. It is the conduct of the Plaintiffs on that date which is in question - - not their state of mind or their perceptions for which they had adequate recourse in the federal judiciary and which they

deliberately and with the advice of their attorneys abandoned. It is the reaction of the City and its officials to that conduct on that particular day of May 31, 1971 which is an issue - - not their alleged conduct before that date for which they have been relieved of any liability as the result of the abandonment of the general claims and not their conduct after that date because no such claims against them were ever made. As the District Court so aptly stated in his 1975 opinion (Appendix A-56), even the events of May 31, 1971 are narrowed to the actual removal of the flag insignia and the defiance of City authority and the public statement that these uniform requirements will no longer be worn: "The nub of the problem was not the picketing and the carrying of signs but was rather this abuse of the uniform and the plaintiffs' stated intention to continue to refuse to wear the flag patch." Out of this narrow factual situation there has arisen the constitutional aberration which gives rise to the several questions and the argument which so strongly suggest the imperative necessity of review and correction by the Supreme Court.

This case was filed in the United States District Court as an original action invoking the various Civil Rights Acts and jurisdictional statutes enumerated in the appendices.

ARGUMENT

1. THE ELEVENTH CIRCUIT HAS REVERTED TO THE ERRONEOUS POSITION THAT WAS FORMERLY HELD BY THE SECOND CIRCUIT AND REJECTED IN *KELLEY V. JOHNSON*, 425 U.S. 238 (1976).

A discordant echo from the past resounds in the Eleventh Circuit opinion: "Although the district court restrained appellants from eliciting testimony concerning the purpose of the flag requirement itself, it was the obligation of ap-

pellees to develop that interest, and they did not seek to do so." 705 F.2d 1299, 1305 (Appendix A-16). *Dwen v. Barry*, 483 F.2d 1126 (2d Cir. 1973), describing a police force as different from the military without the need for the "same type of instant unquestioning obedience" (483 F.2d 1126, 1129), discovered that the right of a police officer to style his own appearance could be found in the First, Fifth, Ninth, and Fourteenth Amendments, with a "personal liberty" label winning the most favor; accordingly the county police department regulation limiting hair length needed to be "justified by a legitimate state interest reasonably related to the regulation" (483 F.2d 1126, 1130), and the department was faulted for failure "to make the slightest showing of the relationship between its regulation and the legitimate interest it sought to promote" (483 F.2d 1126, 1130, 1131). It is obvious that the District Court, sitting in Columbus, Georgia in 1975 and refusing to require the City to prove the necessity of the uniform flag patch, anticipated *Kelley v. Johnson*, 425 U.S. 238 (1976), which reversed the Second Circuit view that the government must prove "a genuine public need for the regulation" (483 F.2d 1126, 1131): "Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power." 425 U.S. 238, 247. The Second Circuit then, like the Eleventh Circuit now (705 F.2d 1299, 1305), had relied on *Garrity v. New Jersey*, 385 U.S. 493 (1967); but the Supreme Court rejected this claim in holding that a *plaintiff* had the burden of proof and in reaching its final conclusion which should control the outcome of the present case:

> "We think the answer here is so clear that the District Court was quite right in the first instance to have dismissed respondent's complaint. Neither this Court, the Court of

> Appeals, nor the District Court is in a position to weigh the policy arguments in favor of and against a rule regulating hairstyles as a part of regulations governing a uniformed civilian service. The constitutional issue to be decided by these courts is whether petitioner's determination that such regulations should be enacted is so irrational that it may be branded 'arbitrary,' and therefore a deprivation of respondent's 'liberty' interest in freedom to choose his own hairstyle. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488 (1955). The overwhelming majority of state and local police of the present day are uniformed. This fact itself testifies to the recognition by those who direct those operations, and by the people of the States and localities who directly or indirectly choose such persons, that similarity in appearance of police officers is desirable. This choice may be based on a desire to make police officers readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself. Either one is a sufficiently rational justification for regulations so as to defeat respondent's claim based on the liberty guarantee of the Fourteenth Amendment" 425 U.S. 238, 247, 248.

It is also worth noting that earlier in the opinion other departmental regulations were discussed without any question as to their validity:

> "Respondent's employer has, in accordance with its well-established duty to keep the

> peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large. Respondent must wear a standard uniform, specific in each detail. When in uniform he must salute the flag. He may not take an active role in local political affairs by way of being a party delegate or contributing or soliciting political contributions. He may not smoke in public." 425 U.S. 238, 245, 246 (Footnotes omitted).

It didn't take the Second Circuit but one more year to extend *Kelley* into the classroom (following Judge Stevens' opinion in *Miller v. School District*, 495 F.2d 658 (7th Cir. 1974) and a "mini-skirt" case in *Tardif v. Quinn*, 545 F.2d 761 (1st Cir. 1976)), when, in *East Hartford Education Association v. Board of Education of the Town of East Hartford*, 562 F.2d 838 (2d Cir. 1977), a school teacher's First Amendment claim of free expression and claims of privacy and liberty were rejected when he challenged the school dress code:

> "Both *Miller* and *Tardif* are stronger cases for the plaintiff's position than the instant case.[14] Both involved dismissals rather than, as here, a reprimand. Moreover, *Miller* involved a regulation of hair and beards, as well as dress. Thus, *Miller* was forced to appear as his employers wished both on and off the job. In contrast, Mr. Brimley can remove his tie as soon as the school day ends. If the plaintiffs in *Miller* and *Tardif* could not prevail, neither can Mr. Brimley.
>
> [14] The claim that such regulations violate the Constitution has fared equally badly in the state courts. See, e.g., *Morrison v. Hamil-*

> *ton County Board of Education*, 494 S.W.2d 770 (Tenn.), cert. denied, 414 U.S. 1044, 94 S.Ct. 548, 38 L.Ed.2d 335 (1973); *Blanchet v. Vermilion Parish School Board*, 220 So.2d 534 (La.App.), writ denied, 254 La. 17, 220 So.2d 68 (1969); but see *Finot v. Pasadena City Board of Education*, 250 Cal.App. 2d 189, 58 Cal.Rptr. 520 (1967)." 562 F.2d 838, 862.

The Seventh Circuit, more recently in *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983), has continued to find limitations to the claims of law enforcement officers (an FBI agent) under the First Amendment; the discussion in the opinion as to the characterization of the FBI as a "paramilitary organization" (710 F.2d 292, 312) and the rather extensive response of the concurrence as to "the compelling needs of the Federal Bureau of Investigation and indeed all law enforcement agencies, in maintaining the highest degree of esprit de corps, confidentiality, efficiency, discipline and supervision" (710 F.2d 292, 325) illustrates the desirability of clarification by the Supreme Court as to how "military" a "para-military" organization should be in light of such cases as *Parker v. Levy*, 417 U.S. 733 (1974), *Brown v. Glines*, 444 U.S. 348 (1980), and even *Chappell v. Wallace*, ____ U.S. ____ (June 13, 1983). It should be remembered that state and local government can make the same argument as the federal government made in the case of *Bush v. Lucas*, ____ U.S. ____ (June 13, 1983), involving an aerospace engineer who was denied a remedy in damages because of his demotion alleged to be in retaliation for his exercise of First Amendment rights: "The Government argues that supervisory personnel are already more hesitant than they should be in administering discipline, because the review that ensues inevitably makes the performance of their regular duties more difficult."

Further applications of *Kelley* have appeared in other circuits:

1. *Shawgo v. Spradlin*, 701 F.2d 470 (13) (5th Cir. 1983), cert. den. Nov. 7, 1983 (*Whisenhunt v. Spradlin*, No. 82-2148):
   "Disciplined police officers' right to privacy had not been infringed by scope of regulation proscribing, as conduct prejudicial to good order, cohabitation of two police officers, or proscribing a superior officer from sharing an apartment with one of lower rank."
2. *Lowman v. Davies*, 704 F.2d 1044 (8th Cir. 1983):
   "Hair length regulations adopted by Arkansas Department of Parks and Tourism, Parks Division, did not violate naturalist's constitutional right to govern his appearance where regulations were rationally related to state's interest in having ease of recognition of park naturalists and promoting esprit de corps."
3. *Kannisto v. City and County of San Francisco*, 541 F.2d 841 (4) (9th Cir. 1976):
   "Police department regulation proscribing unofficer-like conduct tending to subvert good order, efficiency or discipline of department was not unconstitutionally vague as applied to city police lieutenant who was suspended for making disrespectful and disparaging remarks about superior officer while addressing his subordinates during a morning inspection and lieutenant was not entitled to challenge regulation on basis of facial vagueness."
4. *Byrd v. Gain*, 558 F.2d 553 (4) (9th Cir. 1977):

"Police department regulation proscribing unofficer-like conduct tending to subvert good order, efficiency or discipline of department was not unconstitutionally applied to two police officers who received written reprimands following complaints by other police officers which criticized a press release and public statements made by the reprimanded police officers in the course of a public controversy

that had developed over department's employment of stop-and-frisk tactics which had a special impact upon black males within city."

Not only does the panel decision swim against the current flowing from *Kelley*, but it also spouts forth a fountain of new law by holding or implying that the uniform flag insignia requirement is unconstitutional. In arriving at this conclusion, the opinion (Footnote 6) uses the example of segregated water fountains, but we are never told whether or not such fictures could be ripped from the walls of a government building by any offended persons or whether or not it would be more proper to make them the target of an action for a declaratory judgment. Nor are we told why the governing authority of the City of Columbus should be condemned and held liable for enacting such a requirement in 1969 when only one year before the Congress of the United States enacted 18 U.S.C. §700, making it a criminal offense to desecrate any United States flag - - which includes in the statutory definition any "picture or representation" of the flag. Nor does the Court of Appeals ever consider the obvious fact that the Plaintiffs defaced government property - - a City-issued uniform - - in plain violation of the Georgia statute upheld in *Sabel v. State*, 248 Ga. 10 (1981), cert. den. 454 U.S. 973.

2. **SINCE THE COURT OF APPEALS CONSIDERED THE REMOVAL OF THE AMERICAN FLAG INSIGNIA TO BE "SYMBOLIC SPEECH" PROTECTED BY THE FIRST AMENDMENT, ITS ANALYSIS OF THE ISSUE SHOULD HAVE PROCEEDED IN LIGHT OF *UNITED STATES V. O'BRIEN*, 391 U.S. 367 (1968); ON REVIEW THE SUPREME COURT COULD MAKE SUCH AN ANALYSIS IN CONJUNCTION WITH *WATT, SECRETARY OF THE INTERIOR V. COMMUNITY FOR CREATIVE NON-VIOLENCE* (SUPREME COURT NO. 82-1998, CERT. *GRANTED* OCT. 3, 1983).**

It might seem surprising that a decision which concluded that the public removal of American flags from police uniforms constituted symbolic speech protected by the First Amendment managed to arrive at such a result without any reference whatsoever to *United States v. O'Brien*, 391 U.S. 367 (1968); but, since *Kelley v. Johnson*, 425 U.S. 268 (1976) met the same fate, the Court of Appeals was at least consistent in ignoring the binding authority of the Supreme Court. Since it had been clear from the beginning of this case that the May 31, 1971 activity of the Plaintiffs consisted of conduct well beyond the scope of the previous speaking activities outlined in the facts of both the District Court and the Court of Appeals opinions, the City and its officials gave *O'Brien* prominent mention in their appellate brief. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (391 U.S. 367, 376) was being said by the City of Columbus in 1971 just as Chief Justice Warren had said it three years earlier. Although the seven policemen's abuse of their City uniforms should never have been "sufficient to bring into play the First Amendment," even an assumption that " 'speech' and 'nonspeech' elements are combined in the same course of conduct" should have produced a conclusion that "a sufficiently important governmental interest in

regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. 367, 376. The Columbus regulation prescribing flag insignia for police uniforms certainly meets the sufficient justification test of *O'Brien* because it is "within the constitutional power of the Government," it "furthers an important or substantial governmental interest," that interest is "unrelated to the suppression of free expression," and any "incidental restriction on alleged First Amendment Freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. 367, 377.

A reading of the several opinions in *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983) cert. granted, Oct 3, 1983 (*Watt v. CCNV*, Supreme Court No. 82-1998) readily suggests that both the Court of Appeals for the District of Columbia and the Supreme Court have had recent and thorough discussions in the matter of symbolic speech and the rules concerning appropriate times, places, and manners for First Amendment expression that are embodied in such cases as *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). Little would be gained now by discussing in detail the merits of various cases and various positions, and the limited space for this Petition does not allow it. However, the City and its officials echo the view of the five dissenters that the Columbus Police Department should be allowed to draw the line between free speech and wilful disobedience and definance amounting to public and insulting insubordination just as the National Park Service should have been allowed to draw the line at camping in Lafayette Park and the further view of the three dissenters as to "how far judicial and scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding." 703 F.2d 586, 622. The plight of the City of Columbus is just as severe as the plight of the National Park Service and the

potential national ramifications of the Eleventh Circuit opinion would produce even more damage to all levels of government because of the critical nature of the law enforcement function.

The Eleventh Circuit's *ignoring* of *O'Brien* places it in position inconsistent with other circuits that have applied *O'Brien:*

1. *United States v. Bader,* 698 F.2d 553 (2) (1st Cir. 1983):

   "First Amendment did not bar convictions of defendants, who conducted a sit-in inside a post-office and courthouse building in order to protest draft registration, for failing to obey the direction of federal protective officers and for creating certain disturbances in federal buildings."

2. *Davis v. Norman,* 555 F.2d 189 (2) (8th Cir. 1977):

   "Any incidental infringements on father's First Amendment rights by virtue of City ordinance requiring him to remove wrecked vehicle, in which his son had been killed in high-speed police chase, from his front yard where it had been displayed in protest against police abuse of authority, were justified under *O'Brien* test, in that ordinance served basic purpose of protecting community from health and safety hazards created by unenclosed storage of such vehicles, effectuation of that objective by requiring enclosed storage was within constitutional power of city and furthered important and substantial governmental interests, furtherance of those interests was unrelated to suppression of free expression, both governmental interest and operation of ordinance were limited to noncommunicative aspect of father's conduct, and no less restrictive means to achieve enunciated governmental interests could be perceived."

3. *United States v. Crosson*, 462 F.2d 96 (8) (9th Cir. 1972), cert. den. 409 U.S. 1064:

"Fact that burning of United States flag occurred in a university building presumed to be an open forum for the exchange of ideas did not remove defendant from the effect of statute making it an offense to knowingly cast contempt upon the flag by publicly burning it, and fact that defendant may have intended an expression of protest over the Vietnam war was of no significance in determining whether the statute was unconstitutionally applied to defendant."

4. *New Rider v. Board of Education*, 480 F.2d 693 (1) (10th Cir. 1973), cert. den. 414 U.S. 733:

"Junior high school hair regulation, which prohibited hair of odd color or style, which required that hair be tapered or blocked in back and that it not touch shirt collar or ears and which required that sideburns be no lower than earlobe and that the face be clean shaven, was not unconstitutional as violating right of free speech; public school students wearing of long hair is not akin to pure speech."

3. ***PICKERING V. BOARD OF EDUCATION*, 391 U.S. 563 (1968) TIPS THE BALANCE DECISIVELY AGAINST THE PLAINTIFFS, AND THE CONTRARY CONCLUSION BY THE COURT OF APPEALS SUGGESTS THAT IT EITHER IGNORED THE FACTUAL FINDINGS OF THE TRIAL JUDGE AND TRIED THE CASE DE NOVO OR ELSE IT REACHED AN IMPERMISSIBLE CONCLUSION OF LAW BASED ON THE UNCONTROVERTED FACTS.**

The City and its officials stated at the beginning of their Argument on Motion for Rehearing En Banc (Appendix A-155) that "the panel decision is bizzarre in its conclusions and bewildering in its rationale." The panel in Footnote 2

claims to have reached its conclusions without disputing the facts found by the trial judge but it is inconceivable that from such facts such a result would actually occur: either the panel ignored obvious facts which have obvious consequences in human experience or else the panel reached an unconscionable conclusion of law.

The *Pickering* balancing test is stated as follows: "The problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. 563, 568. The trial judge concluded that the Plaintiffs had ample opportunity to express themselves without hindrance prior to May 31, 1971, and the recitation of the Plaintiffs' communications and protests by the panel opinion suggests the same thing. As indicated at the outset of the District Court opinion (Appendix A-57), the present six plaintiffs, along with 32 others, had requested as a part of the present action injunctive and declaratory relief on alleged discrimination in the Columbus Police Department - - which was the matter of "public concern" on which they purportedly expressed themselves but which they apparently found to be so unconvincing that they abandoned by the time of trial. The trial judge found as a fact that the conduct of May 31, 1971, the public removal of the flag emblems and the stated intention not to observe this uniform requirement until these matters of public concern were resolved to the Plaintiffs' satisfaction, constituted a wilful contempt of the proper authority vested in both the City itself and in the officials having supervisory responsibility over the Plaintiffs. If the panel acknowledged these facts, its decision plainly and simply ignored that side of the *Pickering* equation which requires consideration for the governmental interest in preventing disruption detrimental to the efficiency of its public services; if the panel ignored

these facts, it violated the "clearly erroneous" rule and tried the case de novo on paper - - with a rather benign view of a group of Plaintiffs who might produce a different impression in live courtroom testimony.

Regardless of how this decision was reached, it stands as a procedural and constitutional anomaly among the federal circuits. The point can be made by lining up the contrary authority which shows that the Eleventh Circuit stands alone in its administration of *Pickering* - - even if the assumption is made for the moment that the Plaintiffs in the present case had as much latitude in this case as the Plaintiffs in the cases listed below, none of whom are police officers.

1. *Santos v. Miami Region, U.S. Customs Service*, 642 F.2d 21 (1st Cir. 1981):
   Balance tips in favor of state's interest in promoting efficiency of service when letter-writing campaign directed to co-workers and general public identified no particular problem requiring correction, created discord and loss of confidence in integrity of Service, and other channels that could have resolved dispute could have been used.
2. *Janusaitis v. Middlebury Volunteer Fire Department*, 607 F.2d 17 (2nd Cir. 1979):
   Trial judge concluded, after conducting three-day trial and hearing dismissed fireman testify, that he was more concerned with changing the operation of the Department and undermining the authority of its officers and "proving himself right and every one else wrong than with truly promoting the welfare and efficiency of the Department." 607 F.2d 17, 26. Applying the "clearly erroneous" rule and holding that the fireman exhibited a "pattern of conduct" provocative and divisive to institutional efficiency that went beyond First Amendment protection, the Court of Appeals concluded:

"In this state of affairs it would be folly to presume that the functioning of the voluntary fire department would not be seriously impaired if appellant were reinstated by an order of a court. The baleful glance, the hostile look, and the positive distaste for the trouble-maker on the part of his fellow volunteers, coupled with the lingering resentment on the part of appellant himself at not being given the authority he sought, would hardly invoke the comradeship that makes a fire-fighting unit successful." 607 F.2d 17, 27.

3. *Sprague v. Fitzpatrick*, 546 F.2d 560 (3rd Cir. 1976), cert. den. 431 U.S. 937:
Even though his criticisms involved matters of public concern First Assistant District Attorney was discharged because his public declaration questioning the integrity of the District Attorney undermined their working relationship: "If the arousal of public controversy exacerbates the disruption of public service, then it weighs against, not for, first amendment protection in the *Pickering* balance." 546 F.2d 560, 566.

4. *Shaw v. Board of Trustee of Frederick Community College*, 549 F.2d 929 (4th Cir. 1976):
Faculty members were discharged because their conduct went beyond clear speech and violated employment obligation by failing to take part in two mandatory college functions, even though this failure was part of a protest to a change in tenure policy which, standing alone, was protected by First Amendment: "In *Chitwood v. Feaster*, 468 F.2d 359 (4th Cir. 1972), while we held that certain teachers were entitled to a determination of whether or not they were discharged for engaging in constitutionally protected activity, we stated, 'A college has a right to expect a teacher to

follow instructions and to work cooperatively and harmoniously with the head of the department,' and that one 'does not immunize himself against [the] loss of his position simply because his non-cooperation and aggressive conduct are verbalized.' 468 F.2d at 361." 549 F.2d 929, 932.

5. *Gonzalez v. Benavides*, 712 F.2d 142 (2) (5th Cir. 1983):
"The First Amendment does not require elected officials to sit silently by while their appointed chief executive publicly disavows the officials' authority over him."

6. *Anderson v. Evans*, 660 F.2d 153 (6th Cir. 1981):
School Board's dismissal of teacher for "conduct unbecoming a teacher" as evidenced by negative racial remarks about blacks and for "inefficiency" as evidenced by her declining performance attributable to this attitude did not violate due process standards prohibiting vague and indefinite charges nor did First Amendment free speech rights outweigh school's interest in maintaining discipline by immediate supervisors and harmony among co-workers.

7. *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), cert. den. 411 U.S. 972:
Substitute teacher had no First Amendment right to be rehired after criticisms of university administration in front of students: "But we do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally distructive of the proper functioning of the institution. 474 F.2d 928, 931 (Per curiam, panel composed of Judges Swygert, Pell, Stevens)

8. *Nathanson v. United States*, 702 F.2d 162 (8th Cir. 1983):
Emphasizing that the trial judge is the finder of facts whose conclusions cannot be set aside unless clearly erroneous and that the appellate court cannot decide

the case de novo, the Court of Appeals held that an environmentalist employed by the Army Corps of Engineers was discharged not for his opinions but for his argumentative discussions with his superiors which amounted to "disruptive conduct threatening the efficiency of performance of his duties" (702 F.2d 162, 165), and which, whether his "views were right or wrong," was rightfully responded to by his boss as "behavior that was deemed bordering on insubordination" (702 F.2d 162, 166).

9. *Phillips v. Adult Probation Department of the City and County of San Francisco*, 491 F.2d 951 (1) (9th Cir. 1974):
"Regardless of lack of formal regulations forbidding the placing of posters on walls of its employees' offices, city and county probation department had discretion to determine that plaintiff's office was an inappropriate place to display poster expressing approval of persons who were then fugitives from justice; plaintiff's suspension from department for refusal to remove poster could not be claimed to be constitutionally impermissible on ground of lack of formal regulations." (Plaintiff claimed that this poster showing H. Rap Brown, Angela Davis, and Eldridge Cleaver was "a symbolic statement and protest"; his work involved divorce and child support problems, and the poster was considered to be a threat to discipline and harmony in the work force. 491 F.2d 951, 952.)

10. *Schmidt v. Fremont County School District No.25, State of Wyoming*, 558 F.2d 982 (10th Cir. 1977): School principal failed to prove that he was terminated in retaliation for statements in opposition to School Board's career education program and policy of reserved football game seats; rather, he was terminated for the constitutionally permissible reasons found by the trial judge, who approved the conclusions of the School

Board and who struck the balance in favor of the State's interest in stabilizing a troubled school system and in creating harmony among co-workers: " 'These conclusions were based on a variety of grounds, such as tactless and unprofessional comments about a fellow administrator and the school system at a board meeting, the plaintiff's appearance at a board meeting to oppose a board policy on reversed seating at football games and his subsequent lack of cooperating in implementing it, lack of a strong program to prevent student absenteeism and to improve attendance, his failure to recommend non-renewal of the assistant principal's contract in January, 1973, his suspected failure to make teacher evaluations because of his turning in evaluation sheets unsigned by the teacher, his lack of rapport with the students, an altercation with the football coach, and disagreement over the handling of the case of a student who was harmed as a police informer by fellow students.' " 558 F.2d 982, 984.

11. *Foster v. Ripley*, 645 F.2d 1142 (D.C. Cir. 1981): Official of Smithsonian Science Information Exchange made attack on his superior and others concerning administrative controls through external rather than internal channels and thus ended his effectiveness resulting in a dismissal of which he was given notice of reasons and right to appeal which he exercised with representation of counsel.
12. *Brousseau v. United States*, 640 F.2d 1235(9) (Ct. of Claims 1981):

    "Administrative officer's common sense should have forewarned him that his activities in question, i.e., moving before union meeting that agency position be rejected and preparing and circulating petition opposing agency position, were improper and disloyal and could lead to his demotion, and his demotion was not so unexpected as to chill exercise of First Amendment rights."

4. THE *MT. HEALTHY CITY BOARD OF EDUCATION V. DOYLE*, 429 U.S. 274 (1977) RULE SHIFTING THE BURDEN TO DEFENDANTS SHOULD NOT BE APPLIED TO A CASE TRIED BEFORE THE DECISION IN *MT. HEALTHY* WAS RENDERED, NOR SHOULD IT BE APPLIED TO A CASE IN WHICH DEFENDANTS HAVE NO NOTICE UNTIL THE APPELLATE STAGE THAT PLAINTIFFS HAVE CARRIED THEIR INITIAL BURDEN AND PROVED A PRIMA FACIE CASE OF A FIRST AMENDMENT VIOLATION.

Both the facts of this case and the detailed fourth question suggesting review by certiorari show the peculiarly awkward position in which the Defendants have been placed by the Court of Appeals. Beginning with a Complaint predating the Police Hearing Board's consideration of the other charges (besides the "flag incident") which makes no allegations concerning the other charges themselves or the Board's findings on all of the charges and ending with a denial of certiorari and a remand from the Fifth Circuit which only places into issue the May 31, 1971 summary dismissal either in the First Amendment context or in the due process context, the Defendants and their lawyer obviously are surprised that they had some burden of coming forward with some evidence which would address itself to matters which neither the Plaintiffs nor the other circuit ever placed into issue; their surprise increases when an experienced trial judge (21 years on the federal bench) has ruled in their favor on both the First Amendment and the due process issues (There was also a favorable ruling on an equal protection issue, but the Court of Appeals didn't mention it.), and when they are informed a year later that they should have had the prescience to foresee these events, that now (twelve years after the original event) they are subject to

some sort of remedy - - either damages or reinstatement or both. The situation makes no sense under any conceptions of legal procedure.

Judicial history is now repeating itself, and, as in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416, 417 (1979), Petitioners seek a corrective writ from the Supreme Court:

> "The Court of Appeals in the instant case rejected respondents' *Mt. Healthy* claim that the decision to terminate petitioner would have been made even if her encounters with the principal had never occurred:
>
> > 'The [trial] court did not make an express finding as to whether the same decision would have been made, but on this record the [respondents] do not, and seriously cannot, argue that the same decision would have been made without regard to the 'demands.' Appellants seem to argue that the preponderance of the evidence shows that the same decision would have been justified, but that is not the same as proving that the same decision would have been made. . . . . Therefore [respondents] failed to make a successful 'same decision anyway' defense.' 555 F.2d, at 1315.
>
> Since this case was tried before *Mt. Healthy* was decided, it is not suprising that respondents did not attempt to prove in the District Court that the decision not to rehire peti-

> tioner would have been made even absent consideration of her 'demands.' Thus, the case came to the Court of Appeals in very much the same posture as *Mt. Healthy* was presented to this Court. And while the District Court found that petitioner's 'criticism' was the 'primary' reason for the School District's failure to rehire her, it did not find that she would have been rehired but for her criticism. Respondents' *Mt. Healthy* claim called for a factual determination which could not, on this record, be resolved by the Court of Appeals."
> (Footnote omitted)

In applying the *Givhan* procedural refinement of *Mt. Healthy*, *Rosaly v. Ignacio*, 593 F.2d 145 (1st Cir. 1979) emphasizes that plaintiffs must *first* prove a prima facie case *before* defendants are called upon to rebut this evidence and that even a lengthy record does not provide a proper foundation for a factual determination at the appellate level.

5. *ARNETT V. KENNEDY*, 416 U. S. 134 (1974) SHOULD HAVE BEEN APPLIED TO ABSOLVE THE CITY AND ITS OFFICIALS OF ANY LIABILITY RESULTING FROM AN ALLEGEDLY DEFICIENT SUMMARY DISMISSAL BECAUSE THE POST-TERMINATION PROCEEDINGS BEFORE THE POLICE HEARING BOARD CURED ANY DEFECTS WHICH MIGHT HAVE EXISTED.

The opinion of the District Court (Appendix A-56) concluded that the summary dismissal of May 31, 1971 was authorized by Georgia law and that the post-termination hearings before the Police Hearing Board which Plaintiffs invoked and which Plaintiffs never challenged nevertheless cured any defects which Plaintiffs alleged to have occurred.

The opinion cites both Georgia and federal authority in support of these propositions, and this Petition would be needlessly repetitious if it did more than refer to the able analysis by the trial judge. Nor would a circuit by circuit survey of the application of *Arnett* serve any purpose: suffice it to say that, insofar as the City Attorney for Columbus, Georgia knows, a post-termination hearing satisfies due process in the state courts of Georgia and in all federal circuits except the Eleventh Circuit. The Eleventh Circuit concluded, without citing any state or federal authority, that the summary dismissals violated city regulations and city ordinances and that an ordinance had established "a Police Hearing Board to perform the function usurped by McGuffey, Sargis, and Allen." 705 F.2d 1299, 1302. After that observation, there is no reflection on how the non-party Board erred in either its proceedings or in its conclusion to uphold the dismissals; nor does *Arnett* or the Fifth Circuit or the Georgia cases cited by the District Court opinion receive any mention. In effect, the Eleventh Circuit has overruled *Arnett* and its own circuit precedents without undergoing the embarassment of admitting it.

6. ASSIGNMENT OF LIABILITY TO THE DEFENDANTS CANNOT BE JUSTIFIED UNDER *RIZZO V. GOODE*, 423 U.S. 362 (1976) OR *MONELL V. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK*, 436 U.S. 658 (1978); NOR WERE THE INDIVIDUALS' DEFENSES OF GOOD FAITH AND OFFICIAL IMMUNITY EVEN CONSIDERED.

Rizzo v. Goode, 423 U.S. 362 (1976) requires a showing of direct responsibility in order to make officials liable, while *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978) requires a city policy to create corporate liability and rejects the respondent superior theory. There is no analysis by the Court of Appeals on these points. In fact, the observation by the Court of

Appeals that three officials usurped powers of the City or the Police Hearing Board or other persons or entities unknown would lead to speculation as to wether a "usurpee" is liable for the acts of a "usurper." However, one thing is clear: none of the several individuals nor the municipal corporation have escaped liability, yet none have been informed as to why they were held liable.

The final point (No. 25) made in the City's Motion for Rehearing En Banc (Appendix A-162) raises the question of whether *Monell* is retroactive. We respectfully refer the Court to our brief discussion on that point. Can a City that was not a "person" in 1971 for purposes of coming within the jurisdiction of the Civil Rights Act become a person twelve years after the commission of the alleged tort as a result of a 1978 decision changing the rule?

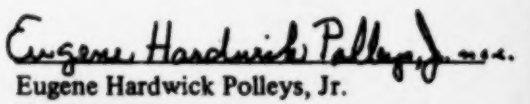
In *Harlow v. Fitzgerald*, _____ U.S. _____, 102 S.Ct. 2727 (1982) there is a thorough discussion of the principle of qualified immunity or good faith immunity which concludes that government officials are shielded from liability for civil damages insofar as their conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known. The point of all of our preceeding discussion suggests that no reasonable person would have known that dismissing the seven police officers in 1971 constituted an infringment on First Amendment Rights, so it would seem that the officials in this case should be shielded by the official immunity and the good faith defenses which they filed in answer to the Complaint but which the trial judge did not have to consider because he found no First Amendment nor due process nor equal protection violations which would create the necessity of invoking these affirmative defenses. The point that we raise in this Petition is that the Court of Appeals did not even mention such defenses, and its decision effectively abolished

the rules. The Defendants should not only be considered under the qualified immunity rule normally associated with executive officials, but they should also receive consideration under the rules of legislative or judicial or quasi-judicial immunity. Recent application of these rules and references to the controlling Supreme Court cases can be found in *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983), and *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983).

CONCLUSION

The first Petition for Certiorari during the first phase of this case involved jurisdictional and abstention questions of considerable importance. Once again, the City of Columbus petitions the Supreme Court of the United States in a case which now calls for correction, not only to prevent judicial anarchy among the circuits and within the controlling authority of Supreme Court precedents, but also to prevent the potential for anarchy among the government services at the national and state and local levels.

Respectfully submitted this the 23rd day of November, 1983.



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CERTIFICATE OF SERVICE

I certify that I have caused to be served the necessary copies of this Petition on Neil Bradley, American Civil Liberties Union Foundation, 52 Fairlie Street, N.W. Atlanta, Georgia 30303 and Joel M. Gora, Brooklyn Law School, 250 Joralemon Street, Brooklyn, New York 11201, Attorneys for Respondents, by causing the printer to place said copies in the United States mail, postage prepaid.

This the 23rd day of November, 1983.

Eugene Hardwick Polleys, Jr.

Eugene Hardwick Polleys, Jr.

APPENDIX A

Robert LEONARD, et al.,
Plaintiffs-Appellants,

versus

The CITY OF COLUMBUS, et al.,
Defendants-Appellees.

No. 82-8158

United States Court of Appeals,
Eleventh Circuit.

May 23, 1983.

Rehearing and Rehearing En Banc Denied Sept. 9, 1983.

Black Former policemen brought suit against city seeking damages for wrongful discharge, and reinstatement. The United States District Court for the Middle District of Georgia, J. Robert Elliott, J., dismissed their claims, and police officers appealed. The Court of Appeals, Kravitch, Circuit Judge, held that black police officers' removal of American flag from their uniforms in an effort to emphasize a widely held perception of racially discriminatory practices in city's police force constituted symbolic speech which was protected under First and Fourteenth Amendments; thus, their dismissal for removing flag from their uniforms was unconstitutional.

Reversed and remanded.

1. Constitutional Law key 90.1(1)
Municipal Corporations key 185(1)

Black police officers' removal of American flag from their uniforms in an effort to emphasize a widely held perception

of racially discriminatory practices in city's police force constituted symbolic speech which was protected under First and Fourteenth Amendments; thus, their dismissal for removing flag from their uniforms was unconstitutional. U.S.C.A. Const. Amends. 1, 14.

2. Constitutional Law key 90.1(1)

Under test applicable to a determination of whether a personnel decision by a governmental body violates an employee's First Amendment rights, plaintiff bears initial burden of proving that his speech or conduct was a substantial or motivating factor in decision and that the speech or conduct was constitutionally protected and once plaintiff succeeds in meeting that burden, burden of proof shifts to defendant to show, by preponderance of the evidence, that it would have reached the same decision in absence of the protected speech. U.S.C.A. Const. Amend. 1.

3. Constitutional Law key 82(1)

A statute which inhibits constitutional rights without sufficient governmental interest is invalid. U.S.C.A. Const. Amend. 1.

ACLU Foundation, Neil Bradley, Atlanta, Ga., Joel M. Gora, Brooklyn, N. Y., ACLU Foundation, E. Richard Larson, New York City, for plaintiffs-appellants.

E.H. Polleys, Jr., City Atty., Columbus, Ga., dor defendants-appellees.

Appeal from the United States District Court for the Middle District of Georgia.

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

KRAVITCH, Circuit Judge:

Appellants are former policemen of the City of Columbus, dismissed by the City for events occurring in May, 1971. In this action challenging their dismissal they assert numerous grounds for relief under the United States Constitution. The district court found merit in none of the grounds asserted. We conclude differently, holding appellants' dismissal violated their first amendment right of free speech; consequently, we reverse.

In early 1971 black members of the City of Columbus Police Department (the "Department") formed the Afro-American Patrolmen's League ("the League") in order to present effectively grievances of the black officers. At that time there was a growing tension among black officers, who perceived that the Department was treating blacks in a discriminatory manner. Specific complaints involved discriminatory hiring and promotion of blacks, discriminatory assignment and disciplinary practices, and alleged police brutality toward members of the black community. Although several black police officers had brought complaints before the Board of Public Safety, they believed no progress was made.

On March 26, 1971, the League's Executive Director, Officer Robert Leonard, issued a press release in which the League criticized Department practices. Following issuance of the release, on April 5, 1971, the League held a press conference in City Commission chambers. Subsequent to these events members of the League met with the Chief of the Department, Chief McGuffey. League members believed that neither the meeting with Chief McGuffey, nor another meeting held with the Mayor of Columbus,

resulted in progress toward resolving League grievances. At no time following these events were the plaintiffs informed they were in violation of any Department regulations.

On May 29, 1971, Officer John Brooks telephoned the Department and notified the desk sergeant he would be unable to report to work due to illness. Testimony at trial indicated that the normal Department practice in such event was for the desk sergeant to arrange rescheduling of the court cases in which the officer was to testify. Instead, when Brooks failed to appear in court he was charged with contempt and two officers were dispatched to his home to arrest him. The Department then charged him with conduct unbecoming an officer and feigning sickness to avoid duty, and suspended Brooks indefinitely from the force.

One of the League's chief complaints against the Department was the disproportionately severe punishment meted out to black officers for disciplinary violations. Not surprisingly, Officer Brooks' arrest on contempt charges, undeniably an event out of the ordinary, caused great consternation among black officers. The black officers attempted to meet with and discuss the suspension with Chief McGuffey. No meeting was held, however, when the Chief insisted on hand-picking the officers he would see, rather than discussing the matter with League officials, as favored by the black officers. After attempts to pursue the matter with Department officials failed, black officers began to picket the police station on May 29 and 30. At all times the demonstrations were peaceful and orderly.[1] Department officials did not inform plaintiffs that the picketing was unlawful, or could result in their dismissal.

---

1. There was evidence, however, that the picket violated police regulations limiting spontaneous demonstrations to groups of no more than ten individuals. Several appellants were charged with this violation in subsequent proceedings.

On May 30 black officers and various civic leaders met to discuss the increasingly tense situation. The evidence is unclear as to what, if anything, was agreed upon by those who participated in the meeting. League members testified the civic leaders and intermediaries suggested a "cooling-off" period during which the black officers would cease picketing and continue performing their duties, in return for which no charges would be brought for previous picketing. Contrary testimony suggests the civic leaders attended in an "unofficial" capacity as "ordinary citizens" and were unauthorized to promise anything. Any notion of a "cooling-off" period soon was dispelled: later that day Officer Leonard and Officer Clark, another League official, were summoned to Department headquarters where Deputy Chief Brown read a list of charges against them. Brown refused to provide a written copy of the charges, and it was unclear if, and when, the officers were to be suspended. Officer Leonard therefore returned to his beat.

Angered by what League members perceived to be a violation of the "cooling-off" period, the League voted to resume picketing the next day. They also agreed to participate in the "flag incident," which gave rise to this suit. On the morning of May 31, seven officers, six of whom are appellants in this action, began to picket the Department. All officers were off-duty, but in uniform. Appellants carried signs with captions such as "WE DON'T WANT TO BE POLICEBOYS; WE WANT TO BE POLICEMEN" and "HAVE YOU EVER HEARD OF POLICE BEING ARRESTED FOR CONTEMPT OF COURT."

Later, after members of the press arrived, the picketing officers assisted one another in removing an American flag emblem from the sleeve of each uniform shirt. The flags were removed carefully, thread by thread, with a razor. At no time was the flag treated with disrespect; to the contrary,

Officer Leonard, speaking for the others present, explained the high respect the officers had for the American flag and the ideals it represented, particularly liberty and equal justice for all. The officers, many of whom had served in Viet Nam, did not believe the Department had extended them just treatment consistent with these principles; accordingly, they considered it inappropriate to wear the flag on their uniform. After Deputy Chief Brown refused Leonard's attempts to present the flag emblems to him, Leonard placed the emblems in his pocket. The incident was at all times peaceful, unaccompanied by disorder, violence or boisterousness. Photographs of the incident portray the scene as peaceful.

At the time the "flag incident" was occurring an emergency conference was held at which Chief McGuffey, Joseph W. Sargis, the Director of Public Safety, and City of Columbus Mayor Allen agreed that discharge of the officers was in order. Although Chief McGuffey indicated the primary reason for the firing was the flag incident, Sargis characterized it as a "crescendo" of the activity of past days, referring specifically to prior League activities. The dismissal letter, printed below in its entirety, refers specifically, and solely, to removal of the flag patch.

Shortly after the flag incident appellants were ordered to report to the Department major's office, where they were informed of their dismissal from the force and given dismissal letters:

> Effective this date, May 31, 1971, you are discharged from the Columbus Police Department for violation of Section 39, paragraphs "G" and "R" of the General Rules of Conduct of the Police Manual, which states:
>
> (G) Conduct unbecoming an officer which might be detrimental to the service.

(R) Any other act or omission contrary to good order and discipline of the department

in that you did publicly remove the American flag from the Columbus Police Uniform while picketing in front of Police Headquarters on May 31, 1971.

The American Flag was made an official part of the Columbus Police Uniform by a unanimous vote of the City Commission on August 18, 1969.

Very truly yours,
B.F. McGuffey
Chief of Police

Director Sargis then held a press conference at which he notified the press of the dismissal and included as reasons for dismissal several grounds not mentioned in the dismissal letter from Chief McGuffey. Sargis accused appellants of making "baseless allegations of unlawful conduct, racism, and discrimination" against the Department without first bringing those complaints through "channels." His statement concluded "[t]oday they picketed the Columbus City Police Department and removed the American Flag from their uniforms. These men did not enlist in the Police Department, they do not have to wear that uniform or flag again; they are dismissed."[2]

---

2 The Columbus City Commission, by resolution of August 18, 1969, made the American flag patch a part of the police uniform. The discharged officers maintain, however, that they never received notice that the patch was a mandatory part of their uniform. This contention is credible; the flag patch requirement appears in no official Department order, memorandum or bulletin, and is not mentioned in the Police Manual. It is questionable whether it was ever communicated to the officers in any way. Chief McGuffey testified at trial that he instructed subordinates to notify the force, but has no idea when this was done. He further testified that when such an order is passed to the ranks, ordinarily a record is made, a copy placed in the file, and another copy posted on the bulletin board. Again, no record concerning notification of the flag patch requirement exists.

On June 4 and 9, 1971, complaining of the procedurally unlawful dismissals, counsel for appellants wrote defendants stating appellants wished to preserve their right to a hearing before the Police Hearing Board. The procedure attendant appellants' dismissal apparently was contrary to every promulgated City of Columbus rule, including the city charter; Ordinance No. 71-1, which established a Police Hearing Board to perform the function usurped by McGuffey, Sargis, and Allen; and the Police Manual, which specifically requires concurrence of the Board of Public Safety (whose successor in interest was the Police Hearing Board).[3] By letter of June

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2 (Continued)

Despite this state of the evidence the district court concluded: "[i]t is obvious that someone in authority in the Department in some manner advised all members of the force of the requirement for there to have been such unanimity of action. The fact the Police Chief could not recall some years later exactly how the message was conveyed to the policemen hardly justified the conclusion that it was not done." The weight of record evidence indicates the district Court's use of the work "unanimity" overstates reality. Many officers failed to wear the flag patch; in fact, one of the appellants had to pin a patch on his arm before he could take it off because his uniform shirt contained no patch. The only evidence that might indicate notice was given is the statement in a League press release "[w]e are compelled to wear the flag." That could as easily mean the patch was on the new uniforms presented to appellants as it could mean appellants were aware of the City resolution they allegedly wilfully violated. Shortly after appellants' dismissal a "reminder" of the flag rule was distributed to the police. All of the above lends doubt to the conclusion that the officers had notice of the City resolution. Because we decide the conduct was protected, we need not resolve this dispute.

3 The day after appellants' dismissal Ordinance 71-154 was introduced, and subsequently passed. That ordinance added a new section to the City of Columbus charter, explicitly permitting dismissal of officers by the Chief of Police subject to later hearing by the Police Hearing Board. The district court dismissed a due process claim based on the lack of authority underlying the dismissals, holding it was cured by a subsequent hearing held before the Police Hearing Board.

10, Deputy Chief Brown informed appellants of their "right to appeal" their dismissal before the Board. In subsequent letters Brown scheduled the hearings, which were postponed once on request of appellants' counsel. The Brown letters of June 24 and 25 set forth additional charges which the Board would consider.

At the hearings appellants were represented by counsel and were given an opportunity to offer witnesses and evidence on their behalf. It was not until the day of the hearing, however, that counsel received the Department's memorandum and packet of material detailing the evidence against each witness, which evidence included a transcript of the press conference held by the League on March 26. After the hearings, the Board unanimously affirmed dismissal of appellants Leonard and White. The dismissals of appellants Smith, Pearson, Willis, and Clark were upheld by a four-to-two vote. Neither in the letters received informing appellants of the Board's decision, nor at any time thereafter, was it made clear on which charges the dismissals were upheld.

Appellants brought this suit in the District Court for the Middle District of Georgia. Initially the plaintiffs sought declaratory and injunctive relief against allegedly discriminatory employment practices of the Department, but in its current posture the six remaining appellants seek only damages for wrongful discharge, and reinstatement. After a hearing, the district court dismissed the complaint on jurisdictional and abstention grounds. We reversed and remanded for trial. *Leonard v. City of Columbus*, 551 F.2d 974 (5th Cir. 1977), *aff'd en banc*, 565 F.2d 957 (5th Cir. 1978), *cert. denied*, 443 U.S. 905, 99 S.Ct. 3097, 61 L.Ed.2d 872 (1979).

In the action plaintiffs alleged the dismissal violated their

first amendment rights, that the sections of the Police Manual under which they were dismissed were vague and overbroad, that the dismissals were violative of due process, and that their discharge was a result of discriminatory enforcement of the Manual's requirements, violating their right to equal protection. After a trial on the merits, the district court denied plaintiffs' claims. Again, we reverse.

[1] Appellants' claim under the first amendment that they were discharged for removing the flag from their uniform, that the removal of the flag constituted symbolic speech, that the symbolic speech was protected under the first and fourteenth amendments, and that, consequently, dismissal on the basis of an exercise of a protected right was unconstitutional. The district judge denied appellants' first amendment claim, concluding that removing a flag patch from the uniform, when the patch was required by City resolution, was not symbolic speech:

> This was a calculated show of contempt for the City authority and a demonstration of refusal to obey its lawful ordinances, rules and commands. If this was not "conduct unbecoming an officer which might be be detrimental to the service" and an "act contrary to the good order and discipline of the department," then the Court does not know how it could be categorized. If this was only "symbolic speech," then it might well be presumed that punching the Police Chief in the nose would also be so regarded. There was no denial of freedom of speech.

We disagree.

The law the district court should have applied derives from the decision of the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429

U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).[4] In *Mt. Healthy* the Court established the test applicable to a determination of whether a decision not to rehire by a governmental body violates an employee's first amendment rights. *Id.*, 97 S.Ct. at 576. Since *Mt. Healthy* this circuit has applied a derivative test to review allegedly unconstitutional firings. *See Waters v. Chaffin*, 684 F.2d 833, 837 (11 Cir. 1982); *Wilson v. Taylor*, 658 F.2d 1021, 1027 (5th Cir. Unit B 1981); *Williams v. Board of Regents*, 629 F.2d 993 (5th Cir. 1980).

[2] Under the *Mt. Healthy* test the plaintiff bears the initial burden of proving that his speech or conduct was a substantial or motivating factor in the decision not to hire him and that the speech or conduct was constitutionally protected. Whether the conduct or speech is protected we determine by reference to the balancing test established by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). In *Pickering* the Court stated:

> [T]he theory that public employment which may may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. *Keyishian v. Board of Regents, supra*, 385 U.S. [589] at 605-606, 87 S.Ct. [675] at 685 [17 L.Ed.2d 629]. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the

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4 The district judge decided the first amendment claim without reference to any case law and without citation to settled authority. Applying the correct legal standard we reach a conclusion different than that of the court below. We reach our conclusion, however, without disagreement as to the facts as found by the court below.

> interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

(citation omitted). Once the plaintiff succeeds in meeting his burden, the burden of proof shifts to the defendant to show, by a preponderance of the evidence, "that it would have reached the same decision to discipline the employee in the absence of the protected speech." *Berdin v. Duggan*, 701 F.2d 909, 911-12 (11th Cir. 1983); *Waters v. Chaffin*, 684 F.2d at 837.

Appellants experienced no difficulty in meeting the first of their burdens, that of showing that their activity was a "substantial" or "motivating" factor in their dismissals. Appellees virtually concede as much. Chief McGuffey testified the officers were dismissed for the flag incident. Director Sargis stated that the flag incident was the culmination of a "cresendo" of activity, that he could not have seven officers act as appellants did and not dismiss them. Because the Police Hearing Board failed to make findings it is impossible to know which charges carried what weight in the decision to uphold McGuffey's decision. Nevertheless, Board members who testified at trial indicated they affirmed the dismissals on the basis of all the charges. "The opinion in *Mt. Healthy* clearly contemplates that a decision may be the product of more than one substantial factor; it refers to 'a substantial factor.' " *Bowen v. Watkins*, 669 F.2d 979, 984-85 (5th Cir. 1982) (emphasis in Bowen). Beyond dispute, appellants have met the first half of their burden.

The law underlying whether appellants' activities were protected under the first and fourteenth amendments is more complex. We must weigh "the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in

promoting the efficiency of the public services it performs through its employees," *Pickering, supra,* 88 S.Ct. at 1734-35. The facts of each case will affect the balance uniquely; in this case we weigh the conduct of officers that goes beyond "pure speech," *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969) against the interest of the City of Columbus in seeing that its police services, a function traditionally accorded special respect, remain effective, *see Waters, supra,* 684 F.2d at 839 (more deference accorded police in *Pickering* balance due to fact that safety of property and person at issue); *Wilson, supra,* 658 F.2d at 1027 (same).

We address initially the interests of appellants, and conclude that despite the fact that the activities of appellants involved conduct as well as "pure speech" their interest in expressing themselves was substantial. Three factors lead to this conclusion. First, the conduct here at issue was symbolic speech, closely "akin to pure speech," *Tinker, supra,* 393 U.S. at 508, 89 S.Ct. at 737. The conduct of the officers involved no violence or disorder: they peacefully removed the American flag from their uniforms. Representing as it does precepts fundamental to this nation, the American flag frequently has been the focal point of suits involving freedom of expression. *Spence v. Washington,* 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974); *Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Significantly, the officers in no way mutilated or defaced the flag; rather in their view they expressed their deep respect for it and the principles it represented. Removal of the patch under these circumstances bears great similarity to pure speech. Second, although we do not evaluate the content, or "social worth"

of ideas, *Williams, supra*, 629 F.2d at 1003, certain types of speech traditionally are accorded greater protection in our society by virtue of the fact that the speech goes to the heart of our democratic process. *See Connick v. Myers*, ____U.S. ____, ____, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983) (speech on "public issues occupies the 'highest rung of the hierarchy of First Amendment values' "); *Pickering v. Board of Education, supra*, 88 S.Ct. at 1737 (debate on matters of public importance "core value" of the Free Speech Clause of the First Amendment); *Williams, supra*, 629 F.2d at 1003 (when matters vital to the public interest at issue employee's right to speak must be protected "vigorously"); *Berdin v. Duggan*, 701 F.2d at 912 (*Pickering* balance includes question whether speech a matter of "public concern"). Appellants sought to emphasize a widely-held perception of racially discriminatory practices in the City of Columbus Police Force. These practices concerned not only internal police matters, but matters of interest to the community-at-large as well. *See Connick, supra*, ____ U.S. at ____, 103 S.Ct. at 1691 (First Amendment affords less protection to complaints concerning purely internal office affairs of public offices than it accords to matters of "public concern"). For example, appellants publicized a perception of discriminatory hiring of police officers, and a concern that beat assignments were being made along racial lines, i.e. black officers in black communities. For a police force to be effective it must have the respect and support of the community as well as its officers; our system of government demands that support be garnered through informed evaluation of circumstance, and not through the suppression of dissent. Third, and finally, courts repeatedly have held that a police officer does not receive a "watered-down version" of constitutionally protected rights by virtue of his public employment on the police force. *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967); *Waters, supra*, 684 F.2d at 836; *Wilson, supra*, 658 F.2d

at 1027. In this context, appellants' interest in peaceful, effective expression of their veiws was great, and we accord it commensurate weight.

Balanced against the interest of appellants is the interest of the City and Police Department in promoting "the effectiveness of the force." We must go beyond asserting the need for "discipline" in "paramilitary" or "quasi-military" organizations, *Leonard v. City of Columbus*, No. 1514, mem. op. at 5-7 (M.D.Ga. Feb. 23, 1982); *see Williams, supra*, 629 F.2d at 1002, and identify the true interest the Department has in suppressing the speech and conduct that resulted in appellants' dismissal. That interest must derive from the reason appellants were dismissed.

Appellees' brief states "[n]one of the plaintiffs in this case were dismissed for speaking, nor were they dismissed for flag abuse; all of them were dismissed for *[d]efying properly constituted authority.*" . . . . Brief of Appellee at 38 (emphasis supplied). The district court elaborated upon the "properly constituted authority." "[Removing the flag] was a calculated show of contempt for the City authority and a demonstration of refusal to obey its lawful ordinances, rules and commands."

[3] Simply stated, the officers were dismissed for failing to obey a resolution of the City of Columbus requiring the flag patch on police uniform. That the speech/conduct that led to dismissal is proscribed by statute is irrelevant to first amendment analysis, however, if that statute suppresses constitutionally protected activity. *See Williams, supra*, 629 F.2d at 1000 n. 13 and cases cited. In other words, there must be an interest apart from compliance with a statute; a statute which inhibits constitutional rights without sufficient governmental interest is invalid.

Although the district court restrained appellants from eliciting testimony concerning the purpose of the flag requirement itself, it was the obligation of appellees to develop that interest, and they did not seek to do so. Given the nature of the ordinance violated, however, we can deduce what the interest would be. The resolution required a flag patch on the sleeve of a police uniform, it did nothing more and nothing less. Testimony confirms the presence of the patch had no relation to the efficient performance of police duties. What the flag patch did accomplish is an integration of the police into the community, the flag patch representing a devotion to, and concern for, American ideals. Although this sort of goal is most admirable, it is specifically because of what the flag stands for that the interest in having the patch worn must bow to the greater interest of the dismissed officers' free speech.

We can discern yet another interest here, one intimately tied to appellants' status as police officers. Although the City fails to advance this argument itself, we recognize an intrinsic interest in having police officers comply with ordinances of a properly constituted governing body. This interest is a valid and important one. It is not determinative in every instance, however, and certainly is insufficient here. Uncontroverted evidence at trial indicated that a number of police officers invariably were without the flag patch. Whether this was because "old" uniform shirts did not have the patch, and whether the officers wilfully or failed to sew them on, is irrelevant: if the City's interest in police compliance with City ordinances was compelling, discipline should have followed every violation. It is likewise undisputed that appellants were the first officers ever disciplined for failing to wear the patch. It was not until after appellants were dismissed that a white officer was disciplined for failing to wear the flag; in contrast to

the dismissals here, that officer was suspended for five days.

Witnesses for the City acknowledged the above facts, but sought to distinguish this case on the basis that appellants stood up in front of the media and removed the flag patch, announcing they could not wear it because of injustice on the force. Such testimony only serves to emphasize that appellants were not punished for failing or refusing to wear the flag,[5] they were punished for speaking. That the City may not do. *Mt. Healthy*, supra *Williams*, supra. Weighing the strong interest of appellants in speaking on a matter of public importance against the interest of the City in having the flag worn on the uniform, an interest no City official showed concern for until these black officers took the patch off, we can only conclude the speech was protected.[6]

This brings us to the second step of analysis under *Mt. Healthy*. *Mt Healthy* recognized that if the speech was protected no reason would justify disciplinary action on account of the speech. The *Mt. Healthy* Court therefore required that, once a plaintiff has met his burden, the burden shifts to the defendant to show, by a preponderance

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5 Even if every officer who forgot or refused to wear the flag had been punished prior to these events, on the facts of this case it is doubtful that the conduct of appellants was properly subject to discipline. At the time of the flag incident appellants were off-duty; they would not be in violation of the City resolution until they appeared for duty without the flag. *See Hess v. Indiana*, 44 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (words advocating lawless activity in future not punishable unless they caused imminent lawless activity). Accordingly, discipline was meted out in this case prematurely.

6 Even assuming the interest of the state in having police officers comply with laws, that interest is not an absolute one. Officers would be under no compunction to comply with a law unconstitutional on its face, for example one that required white officers to use one drinking fountain, and blacks another.

of the evidence, that the discipline would have occurred even in the absence of the protected conduct. Here, it was the obligation of the City of Columbus to show that dismissals would have occurred despite the flag incident. The City offered no evidence in this regard; indeed, it objected to plaintiff counsel's attempt to discern what role the flag incident played in the minds of Board members who affirmed the dismissal.[7] The Chief of Police testified he dismissed the officers for participating in the flag incident. Director Sargis compared the flag incident to the straw that broke the camel's back, the culmination of a "crescendo" of first amendment activity.

Appellees having failed entirely to address, let alone prove, their burden under *Mt. Healthy*, the judgment of the court below is reversed and the case is remanded for a determination of the appropriate remedy.

REVERSED.

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7 Although, in part upon motion of appellee, Judge Elliott cut off questioning about whether the policemen would have been dismissed for the flag incident alone as "pure speculation" Director Sargis responded to the question stating, "[I]f there had been nothing else I doubt seriously that I would have fired them." Given the other activities, however, the flag incident "motivated," indeed directly caused, the dismissals.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ROBERT LEONARD, et al.,

Plaintiffs

V.

THE CITY OF COLUMBUS, et al.,

Defendants

CIVIL ACTION NO. 1514

OPINION
Filed February 23, 1982

This suit stems from certain events occurring during the "Summer of 1971" in Columbus, Georgia. Other groups of Plaintiffs have litigated constitutional claims arising during this period and both federal and state courts have refused to sustain their complaints. See the unpublished opinion of this Court in *Community Action Group, et al. v. City of Columbus, et al.* (Civil Action No. 1528 in the Columbus Division, decided January 31, 1972), which decision was affirmed by the Court of Appeals for the Fifth Circuit at 473 F.2d 966 (1973), and rehearing denied at 475 F.2d 1404, and *Sumbry, et al. v. Land*, 127 Ga. App. 786, 195 SE2d 228 (1972), cert. den. 414 U.S. 1079 (1973). The turbulent events from which this case arose have been well documented in those opinions.

The present action was brought under the provisions of §§ 1331 and 1343 of Title 28, and §§ 1981 and 1983 of Title 42 of the United States Code. There were originally 38 Plaintiffs who requested injunctive and declaratory relief

with regard to alleged discriminatory employment practices by the Columbus Police Department, but by the time the case came on for hearing 32 of the Plaintiffs had opted out of the litigation and the 6 remaining Plaintiffs who had been discharged from the Columbus Police Department on May 31, 1971 elected to pursue only the relief sought in divisions 1, 2, 10 and 11 of the prayers of the complaint, which seek damages for wrongful discharge and injunctive relief for reinstatement.

After a hearing this Court entered an order dismissing the complaint on jurisdiction and abstention grounds because the Plaintiffs had initiated an appeal proceeding available to them in the state tribunals which was still in process at the time they filed this complaint in this Court. On appeal the Court of Appeals for the Fifth Circuit remanded the case to this Court to be decided on the merits. *Leonard, et al. v. City of Columbus, et al.*, 551 F.2d 974 (1977). Thereafter the Supreme Court denied the Defendants' petition for a writ of certiorari, three of the Justices dissenting and filing an opinion. 443 U.S. 904 (1979).

This opinion is filed in compliance with the remand order and the Court's findings of fact and conclusions of law are as hereinafter indicated.

The Plaintiffs who remain in this case are Robert Leonard, Willie L. Pearson, Jr., Vinson Willis, John H. Clark, Jr., Gary L. Smith and Freddie L. White, who were as of May 31, 1971 sworn members of the Police Department of the City of Columbus, Georgia.[1] The Defendant City of Columbus, Georgia is a consolidated minicipal government incor-

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1 As of that date there were 52 black police officers on the force.

porated pursuant to the laws of the State of Georgia. The Defendant J. R. Allen was Mayor of Columbus on May 31, 1971, but he is now deceased. The Defendant A. J. McClung was the Mayor Pro Tem of the City. The Defendant Joseph W. Sargis was the Director of Public Safety. He no longer occupies that position. The Defendant Leonard Leavel was a civilian member of the Police Hearing Board, but he no longer occupies that position. The Defendant Hugh Bentley was a civilian member of the Police Hearing Board, but he no longer occupies that position. The Defendant B. F. Mc Guffey was the Chief of Police of the Columbus Police Department, but he no longer occupies that position. The Defendant S.W. Brown was the Assistant Chief of Police of the Police Department, but he no longer occupies that position.

On August 18, 1969 the Columbus City Commission, the governing body of the City, by official action ordered that all police officers would thereafter be required to wear a replica of the American flag in the form of a cloth patch as a part of the police uniform.

For several weeks prior to May 31, 1971 the 6 Plaintiffs above named and a number of other black police officers were members of an organization known as the Afro-American Patrolmen's League, a group who had made public complaints about the Columbus Police Department, principal of which was that there was racial discrimination within the Department. These complaints were aired by them through press conferences, press releases, etc. When the officials of the City did not respond to their complaints in a manner deemed satisfactory to them the 6 Plaintiffs began picketing the police headquarters carrying signs setting forth some of their demands. The picketing was carried on during the Plaintiffs' off-duty hours, but they wore their police uni-

forms. Neither their superiors in the Police Department nor any other official connected with the City at any time made any attempt to interfere with the picketing nor was there any intimation that the Plaintiffs would be penalized in any way for the public expression of their views. When by the afternoon of May 31 (the third day of picketing) it appeared that the picketing activity was not attracting sufficient public attention the Plaintiffs decided to stage an incident that would arouse the public. When television cameramen and newspaper photographers arrived on the scene, as if by pre-arrangement, each of the Plaintiffs proceeded to cut the flag emblems from their uniforms. Having done so, they attempted to deliver the emblems to the Deputy Chief of Police and when he refused to accept them one of the Plaintiffs acting as spokesman for the group stated that they would not wear the flag emblem until they got what they wanted. All of this was, of course, dutifully recorded by the news media and widely publicized, just as the Plaintiffs clearly intended it should be. Later that afternoon the Plaintiffs were summoned to the Police Major's office and they were advised that they were being dismissed from the police force and they were given letters explaining their dismissal. The letters stated:

> "Effective this date, May 31, 1971, you are discharged from the Columbus Police Department for violation of Section 39, paragraphs 'G' and 'R' of the General Rules of Conduct of the Police Manual, which states:
>
> (G) Conduct unbecoming an officer which might be detrimental to the service
>
> (R) Any other act or omission contrary to good order and discipline of the department
>
> In that you did publicly remove the American

Flag from the Columbus Police Uniform while picketing in front of Police Headquarters on May 31, 1971.

The American Flag was made an official part of the Columbus Police Uniform by a unanimous vote of the City Commission on August 18, 1969.

Very truly yours,
B.F. McGuffey
Chief of Police"

Section 39 of the General Rules of Conduct of the Police Manual (in pertinent part) is as follows:

"39. Charges Resulting in Dismissal or Disciplinary Action. Any member is subject to discipline by the Police Chief, or to dismissal, demotion or suspension by the Police Chief, subject to concurrence by the Board of Public Safety, for committing any of the following offenses:

. . .

(g) Conduct unbecoming an officer which might be detrimental to the service.

. . .

(r) Any other act or ommission contrary to good order and discipline of the department."

The Director of Public Safety concurred in and approved of the action taken by the Chief of Police and an ordinance adopted by the City Government on January 12, 1971 had

named the Police Hearing Board as the successor to the Board of Public Safety.

The Chief of Police notified each of the Plaintiffs in writing that they had the right to appeal their dismissals to the Police Hearing Board. Counsel for the Plaintiffs advised the Board that the Plaintiffs wished to preserve their right of appeal to the Board. Thereafter the Plaintiffs were given written notice of the charges which would be the subject of the hearing, a date agreeable to the Plaintiffs' counsel was fixed for the hearings and the hearings were conducted by the Board. The Plaintiffs were present, were represented by counsel and were given opportunity to make a full presentation of their cases. After consideration the Board approved the dismissals and the dismissals thereupon became final.

The Plaintiffs contend that they were denied their constitutional right to freedom of speech and that they were not accorded due process.

With regard to freedom of speech it should be remembered that a municipal police department is a para-military organization which is charged with the responsibility of protecting the public and upholding the authority of the City government. Thus a vital public interest is involved and to satisfactorily perform this duty the employees of a police department must be governed by reasonable rules and regulations. One may certainly criticize, but for a police officer to publicly announce that he will not obey the commands of a valid city ordinance is the rankest form of insubordination and, unless promptly dealt with, would lead to the complete disruption of the proper relationship between the superior and the subordinate with the concomitant impairment of an effective municipal police force. The evidence

shows that the Plaintiffs and the black police officers association of which they were members had for weeks prior to May 31 been making public comment and holding press conferences and issuing press releases stating their grievances and criticizing the City Government in general and the Police Department in particular and no coercive action had been taken by anyone connected with the City Government to stifle the criticism, and, as has already been noted, Plaintiffs were allowed to conduct their picketing activities on the sidewalk and display their placards in front of the Police Headquarters for three days without hindrance. But, the Plaintiffs contend that cutting the flag emblem from the uniform was only "symbolic speech", likening this to a situation in which a person might refuse to salute the flag. The comparison is invalid. The person who refuses to salute the flag is under no compulsion to do so. Here we have police officers of a city who upon assuming office agreed to obey the Rules of Conduct of the Police Department and who are sworn[2] to uphold the authority of the City and enforce its ordinances, one of which requires the wearing of the flag emblem as a part of the uniform, deliberately cutting the flag emblem from the uniform and announcing publicly

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2 The oath which the Plaintiff took was as follows:
"OATH OF A POLICEMAN, CITY OF COLUMBUS, GEORGIA
I, _____, a Police Officer for the City of Columbus, do solemnly swear that during my continuance in said office, I will, to the best of my skill and ability, faithfully discharge all the duties required of me, and execute the orders of my superior officers, and in all cases conform to and enforce the criminal laws of the state of Georgia, the Ordinances of the City of Columbus, and obey the rules governing the Police Department, and report all violation of same that may come to my knowledge. I will not persecute the innocent, nor help to shield the guilty from punishment, nor will I be influenced in the discharge of my duty by fear, favor or affection, reward or the hope thereof; and in all my acts and doings I will be governed by the rules and ordinances applicable to the Police Department.
SO HELP ME GOD."

that they will refuse to wear it. This was a calculated show of contempt for the City authority and a demonstration of refusal to obey its lawful ordinances, rules and commands. If this was not "conduct unbecoming an officer which might be detrimental to the service" and an "act contrary to the good order and discipline of the department", then the Court does not know how it could be categorized. If this was only "symbolic speech", then it might well be presumed that punching the Police Chief in the nose would also be so regarded. There was no denial of freedom of speech.

With regard to due process, the first contention of the Plaintiffs is that no one ever told them before May 31, 1971 that the flag emblem was a part of the police uniform and that they were required to wear it. All of the evidence (with the exception of the Plaintiffs' testimony) contradicts this assertion. Immediately after the adoption of the ordinance in 1969 which mandated the wearing of the flag emblem the emblems were acquired by the Police Department and delivered to the individual policemen and were sewn on the uniforms and were thereafter worn by all policemen on the force. It is obvious that someone in authority in the Department in some manner advised all members of the force of the requirement for there to have been such unanimity of action. The fact that the Police Chief could not recall some years later exactly how the message was conveyed to the policemen hardly justifies the conclusion that it was not done.

But the evidence which most clearly belies the Plaintiffs' contention that they did not know that they were required to wear the flag emblems is the fact that each of the 6 Plaintiffs was a member of the Afro-American Patrolmen's League, an organization which had been formed to present

grievances to the City governing body and to the Police Department and which from time to time made public pronouncements and issued press releases alleging what were described therein as "abuses" in the Police Department, and on March 27, 1971 the League issued a "press release" to the news media in which a number of grievances were listed and the first complaint made was that they (the members of the League) were required to wear the flag emblem, the exact language being: "We are compelled to wear the flag."

The Plaintiff Leonard was the Executive Director of the League and the Plaintiffs Perason and Clark were officers in the organization. Indeed, the Plaintiff Leonard is the person who disseminated the news release. All of these facts lead the Court to conclude that the Plaintiffs' contention that they did not know that they were required to wear the flag emblem is simply incredible and would justify the entertainment of some doubt as to their credibility in other respects.

The Plaintiffs next complain that the Rules of Conduct contained in the Police Manual are unconstitutionally overbroad and vague and that they were never advised by the Police Department as to what might constitute "conduct unbecoming an officer which might be detrimental to the service" or "any other act or omission contrary to good order and discipline of the department", and specifically that they were never told prior to May 31, 1971 that their conduct on that date would constitute "conduct unbecoming an officer which might be detrimental to the service" or "any other act or omission contrary to good order and discipline of the department", and that the determination made by the Police Chief on May 31, 1971 without such prior notice was a denial of due process.

It is the Court's view that it would be entirely unreasonable to require that a police manual describe every act which might be committed by an officer which could properly be categorized as "conduct unbecoming an officer which might be detrimental to the service" or "any other act or omission contrary to good order and discipline of the department". All that is required is that the officer know that he is subject to dismissal if his act is one that reasonably fits the general description.[3] In this case it is clear that it could reasonably be anticipated that the conduct of the Plaintiffs in the circumstances here presented would have been considered "conduct unbecoming an officer which might be detrimental to the service" or "any other act or omission contrary to good order and discipline of the department" by the Police Chief, who was the person responsible for maintaining good order and discipline in the department. The Plaintiffs knew that the act of defiance which they put on for the benefit of the news media could not be countenanced by their superiors in the department and was bound to be regarded as "conduct unbecoming an officer which might be detrimental to the service" or "any other act or omission contrary to good order and discipline of the department".[4] The Chief of Police could not have reasonably been expected to notify the Plaintiffs *in advance* of their actions that their conduct would subject them to

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3 "Moreover, it is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees includes 'catchall' clauses prohibiting employee 'misconduct', 'immorality', or 'conduct unbecoming.' "
Meehan v. Macy, 392 F.2d 822, 835 (U.S. App.D.C. 1968).

4 "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."
Parker v. Levy, 417 U.S. 733, 756 (1974).

discharge because no police officer in the department had ever done such a thing and the Police Chief had no reason to expect that the Plaintiffs would do so.

The Plaintiffs complain of procedural defects in their dismissals, asserting that they were "discharged without prior notice or hearing by B.F. McGuffey, Chief of Police, contrary to the Ordinance No. 71-7 which grants the exclusive power to discharge to the Police Hearing Board. . .".

The ordinance referred to had as its stated purpose the establishment of "procedures for the prompt and thorough investigation of alleged or suspected misconduct of commissioned officers of the Columbus Police Department," and it sets out a process of investigation and notice culminating in a hearing before the Police Hearing Board. Section 17-35.4(C) of the ordinance provides that "The Chief of Police shall exercise the powers as shown in Section 17-38 of this Article," but, apparently as a result of error in drafting, there is no Section 17-38, so this ordinance does not inhibit or diminish in any way the authority of the Chief of Police to dismiss an officer as set out in Section 39 of the General Rules of Conduct of the Police Manual, subject to ultimate review by the Police Hearing Board, and the Chief of Police made it clear by his testimony that when he discharged the Plaintiffs he was exercising the powers given him under Section 39 of the Police Manual. He stated: "I had the power in '71 to interview and hire and . . . I could also fire . . . we were going under Section 39 where I had the power to discipline, suspend or demote . . . by taking it up with the Director of Public Safety."

When the Police Hearing Board conducted the hearing in this matter all of the procedural requirements of the ordinance were complied with. Each of the Plaintiffs received

written notice of the charges which brought about their dismissals on May 31, 1971, and each was represented by counsel before, during and after the hearings. But the Plaintiffs contend that all of the procedural formalities listed in the ordinance should have been complied with before the Police Chief issued his dismissal order and that the absence of such compliance deprived them of due process. Neither the law of Georgia nor of the United States supports such a theory.

Even if it is assumed for the purpose of discussion that there was some procedural defect prior to the hearing before the Police Hearing Board this would not constitute a denial of due process under Georgia law as explained by the Court of Appeals of Georgia in *Lentz v. State Personnel Board*, 146 Ga.App. 366 (1978). Lentz was a state employee with a permanent status under the Merit System. He was discharged from this employment because of alleged misconduct. He was not informed of the nature of the accusations against him prior to his discharge. He demanded a hearing to contest the grounds of his discharge, whereupon he was advised of the nature of the charge against him 18 days after his termination and he was afforded a hearing. He contended that a failure to grant him a hearing prior to discharge deprived him of due process. The Court of Appeals said:

> "Due process does not require a hearing prior to discharge (Brownlee v. Williams, 233 Ga. 548, 553 (212 SE2d 359)), and procedural defects prior to a fair hearing may be cured by that subsequent hearing. Peppers v. United States Army 479 F.2d 79, 83 (4th Cir. 1973). When an agency neglects to follow a procedural rule but its failure inflicts no significant injury on the party entitled to observance of the rule, the error does not

prevent further administrative or judicial action. EEOC v. Airguide Corp., 539 F.2d 1038, 1042 (5th Cir. 1976). For a procedural defect to violate due process, the defect must be shown to be prejudicial. Alsbury v. United States Postal Service, 392 F.Supp. 71 (C.D. Cal. 1975). Assuming, arguendo, that the regulations in existence at the time of appellant's dismissal required that he be given 15 days notice prior to an adverse action being taken against him with the right to call witnesses and present rebuttal, and that these requirements were violated, such violations were cured by the full hearing subsequently extended to Lentz with the right, exercised by him, to cross examine adverse witnesses and present evidence in his own behalf."
146 Ga. App. 366, at 367-368.

In the case of *In re Wiggins*, 144 Ga. App. 707 (1978), the Court of Appeals of Georgia dealt with issues and facts similar to those here presented. A Columbus police officer was dismissed from the force for conduct unbecoming an officer and for falsification of reports, all of which were alleged to be violations of the "Police Manual". He was notified in writing of the results of a police investigation and he was advised of his right to appeal to the Personnel Review Board. He filed an appeal and at a hearing conducted by the Board all of the witnesses who were interviewed in the internal Police Department investigation were called and they testified under oath and the appellant was afforded an opportunity to cross-examine them and the Personnel Review Board sustained his dismissal. He contended that he was denied due process by the failure to grant him a hearing prior to the dismissal action taken against him by the Chief

of police. The Court of Appeals held:

> "At the police department investigation appellant was not confronted by any witness who gave testimony against him and was not permitted to cross examine these witnesses prior to the date of his discharge on October 21, 1976. It is on this factor that he contends that he was denied due process of law under our Federal and State Constitutions. While he was not granted a hearing prior to the initial discharge, he was granted a trial-type hearing on his appeal before the personnel review board where he was confronted by the witnesses and afforded the opportunity to cross examine the witnesses and to offer evidence in his own behalf. In Aycock v. Police Committee, 133 Ga.App. 883 (212 SE2d 456) we held, citing Arnett v. Kennedy, 416 U.S. 134 (94 Sc 1633, 40 LE2d 15), that due process was not violated by the failure to grant a trial-type hearing *before* rather than after an adverse personnel action was taken against an Atlanta police officer. This rule applies here and the trial court correctly concluded that appellant was not denied due process by the failure to grant him a hearing prior to the dismissal action taken against him by the chief of police." [5]

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5 Wiggins contended that his discharge was complete when he was dismissed by the Chief of Police (which is the same contention made by the Plaintiffs in this case) but the Court of Appeals held that "a reasonable construction requires the conclusion that the police chief has the power to discharge prior to a hearing by the personnel review board but the effective date of a discharge is not final until the board

144 Ga. App. 707, at 708.

The dismissal of the Plaintiffs on May 31, 1971, as subsequently approved by the Police Hearing Board, not only complied with the procedural rules of Columbus, Georgia, but also complied with any rules of procedural due process as guaranteed by any constitutional provision. The above quoted Georgia cases not only make this clear as a matter of state law, but they also cite federal authority including the leading case of *Arnett v. Kennedy*, 416 U.S. 134 (1974) for the proposition that a posttermination hearing satisfies the requirements of procedural due process.

Even if it should be assumed that the Defendants in some manner failed to follow all of the specifics of City Ordinance No. 71-7, the Court of Appeals for the Fifth Circuit has nevertheless held in *Glenn v. Newman*, 614 F.2d 467 (1980) that:

> "Although pretermination procedures afforded city police officer did not conform with minimum due process requirements, any error involved was cured in subsequent public hearing before mayor and city council in which officer received written notice of charges against him, was given sufficient opportunity to prepare for hearing, was represented by an attorney who examined and cross-examined witnesses on his behalf, and was allowed to present his case orally." Headnote 6.

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5 (Continued)

passes on an appeal or the employee has waived his right of appeal", this being consistent with the position taken by the Defendants in this case, i.e., that the Plaintiffs' discharges were not complete until the Police Hearing Board had approved the action taken by the Chief of Police.

From the foregoing the Court concludes that the dismissals of the Plaintiffs were valid under Georgia law and Federal law and the procedures employed did not deprive the Plaintiffs of due process.

It is noted that the opinion of the Court in *Glenn v. Newman*, supra, suggested that if there was an erroneous pretermination procedure which was subsequently cured by posttermination hearing, the discharged employee could recover back pay which would have accrued between the two events. However, in *Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. 1981) the Court of Appeals for the Fifth Circuit applying the decision of the Supreme Court in *Carey v. Piphus*, 435 U.S. 247 (1978), makes it clear that the conclusion arrived at by the Court in *Glenn v. Newman* regarding back pay could no longer be followed. So, the Plaintiffs in this case could not be sustained in any claim for damages for pay lost between the time they were discharged by the Chief of Police and the time the discharge was affirmed by the Police Hearing Board even if there was some procedural deficiency in connection with the discharge by the Chief of Police.

Finally, the Plaintiffs assert an equal protection claim, contending that the action taken by the Chief of Police and the Police Hearing Board with regard to them was more severe than action taken against white police officers in similar situations. The quick answer to this contention is that no officer in the Columbus Police Department, white or black, had ever been guilty of conduct even remotely similar to the conduct of the Plaintiffs, and there is, therefore, no basis for comparison. The Plaintiffs cite an instance when a white officer was suspended for 5 days for failing to have the flag emblem on his uniform, but the situation there was that the officer inadvertently reported for duty wearing a jacket which had been issued at some time in the past to which the emblem had not been affixed. He did not

refuse to wear the emblem. He did not cut the emblem from the jacket. He did not stage an act of defiance for the benefit of the news media. He did not proclaim that he would not wear the emblem. He had simply negligently failed to see to it that the emblem was affixed and was therefore considered to be "out of uniform". No valid comparison can be made of these two incidents and the Court concludes that there is no evidence to support the claim of disparate treatment.

Consistent with the foregoing, the Court concludes that the Plaintiffs have not carried their burden of proving that they are entitled to prevail on any of their asserted claims. Accordingly, judgment will be entered for the Defendants.[6]

ENTERED this 23rd day of February, 1982.

/s/ J. Robert Elliott
UNITED STATES DISTRICT
JUDGE

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6 In view of the disposition here made, the Court pretermits discussion of the question whether some or all of the Defendants are entitled to a defense of partial or total immunity as against the claims of the Plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ROBERT LEONARD, et al

Plaintiffs

Versus

THE CITY OF COLUMBUS, et al

CIVIL ACTION NO. 1514

Filed February 23, 1982

JUDGMENT

Pursuant to the Opinion dated and filed on February 23, 1982, and for the reasons stated therein, Plaintiff's are not entitled to prevail on any of their asserted claims.

Judgment is therefore entered in favor of the Defendants. This 23rd day of February, 1982

GIRARD W. HAWKINS, CLERK

By; /s/ Louie G. Broadwell
Louie G. Broadwell
Deputy Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES

CITY OF COLUMBUS ET AL. V.
ROBERT LEONARD ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 77-1032. Decided June 25, 1979

The petition for a writ of certiorari is denied.

Mr. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

Respondents were dismissed from their positions with the Columbus Police Department on May 31, 1971, for deliberately removing the American flag emblem from their uniforms during a public demonstration. Four days later, respondents requested hearings before the Police Hearing Board, a state-created board to which officers could appeal their discharges. Counsel for respondents informed city officials that respondents "are anxious to have a hearing on these matters and request that all efforts be made to give us an early hearing date." The Deputy Chief of Police responded by promptly notifying respondents that a "Police Hearing Board will be scheduled in the near future to hear your appeal and you will be notified of the time, date and place the hearing will be conducted." Only a week after receiving the letter granting their request for a Police Hearing Board, respondents, apparently not satisfied to invoke only the state review process, also filed the federal civil rights action now

before us. Respondents claimed, *inter alia*, that the failure to accord them a hearing before they were discharged violated both their Fourteenth Amendment right to due process *and* Columbus City Ordinance No. 71-7[1]

Hearings were initially scheduled before the Police Hearing Board for June 28, 1971, but, at the request of respondents' counsel, postponed until mid-July. The dismissals of respondents Leonard and White were unanimously upheld by the Board; the remaining dismissals were upheld on four to two votes. Although review of the Board's decisions was clearly available in state court, see *Ball v. Police Committee of the City of Atlanta*, 136 Ga.App. 144, 145, 220 S.E. 2d 479, 480 (1975), respondents chose not to avail themselves of the further state proceedings. Instead, having lost in the first stage of the state remedial process, respondents decided to change horses and pursue their action in federal court.

On April 17, 1975, the District Court for the Middle District of Georgia dismissed respondents' federal action. The District Court ruled that respondents could not pursue state remedies part way and then switch in mid-stream to a federal forum; having chosen initially to invoke state remedies, that route must be exhausted. Respondents

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1 The second prayer of the respondents' complaint asked:

"2. That, this Court exercise its pendent jurisdiction and Chief of Police, B.F. McGuffey be preliminarily and permanently enjoined from discharging plaintiffs . . . on the grounds that he lacks the power or authority under City of Columbus Ordinance 71-7 to discharge police officers summarily as he did on May 31, 1971, and enjoin the Chief of Police, the Police Department and all other defendants from refraining to reinstate said plaintiffs and from withholding back pay from May 31, 1971."

Petitions also claimed that their dismissals violated their First Amendment rights of speech, association and petition.

> "seek to relitigate the same cause of action, based on the same set of facts, merely by changing legal theories and sovereignties. They do so despite the availability of a state process of judicial review of decisions of quasi-judicial tribunals such as the Police Hearing Board."

Dismissal of respondents' complaint was also supported by federal principles of abstention since respondents claim for relief relied in part

> "on the alleged misapplication of a local ordinance which [respondents] ask this Court to construe in their prayers for relief. The present federal action seeking reinstatement would have been obviated had the [respondents] prevailed in their view before any of the four levels of state tribunals available to them."

The Court of Appeals for the Fifth Circuit reversed, holding, without detailed analysis, that the District Court should have reached the merits of respondents' claims.

Petitioners contend, amongst other arguments, that respondents should be required to exhaust their state remedies before filing an action under 42 U.S.C. §1983 and that the District Court therefore properly dismissed the action. In *Monore v. Pape*, 365 U.S. 167 (1961). this Court held that one seeking redress for the deprivation of federal rights need not *initiate* state proceedings before filing an action under §1983. *Id.*, at 183. Here, however, we are confronted by a quite different and unanswered exhaustion issue — "that of the deference to be accorded state proceedings

which have already been initiated and which afford a competent tribunal for the resolution of federal issues." Cf. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609-610, n. 21 (1955) (emphasis added). The District Court held that dismissal was in order under a doctrine that is best described as "They who invoke must also exhaust." Such a rule is not precluded by our prior decisions and indeed would seem to be supported by the logic of prior opinions. I would therefore grant certiorari to consider whether the Court of Appeals erred when it concluded that the District Court should have reached the merits of respondents' action.

Principles of federal-state comity have given rise to a number of limitations on the exercise of federal jurisdiction over state laws and actions. The equitable restraint doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971) holds that, absent "exceptional circumstances," a federal court should not interfere with pending state criminal or civil proceedings in which the State has an important interest.[2] See, *e.g.*, *Huffman, v. Pursue, Ltd., supra; Juidice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Moore v. Sims*, ____ U.S. ____ (1979).

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2 In *Younger, supra*, we recognized that the doctrine of equitable restraint "is based in part on the traditional doctrine that a court of equity should stay its hand when a movant has an adequate remedy at law, and that it 'particularly should not act to restrain a criminal prosecution.' [401 U.S.,] at 43. But we went on to explain that this doctrine 'is reinforced by an even more vital consideration,' an aspect of federalism which we described as

" 'the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' *Id.*, at 44."

Huffman v. Pursue, Ltd., 420 U.S. 592, 600-601 (1975).

The federal action must be dismissed not only where it threatens to interfere with active state proceedings but also where state proceedings have ended because of the failure of the federal plaintiff to appeal an adverse state decision. In *Hauffman v. Pursue, Ltd., supra,* for example, a state trial court ordered the respondent's theater closed and all personal property used in its operation seized and sold. Rather than appealing this decision, the respondent brought a §1983 action in federal court seeking to enjoin enforcement of the state court's judgment. We held that the Federal District Court's action in granting the injunction was improper under *Younger.* Even though the state trial court judgment might have become final, "a necessary concomitant of *Younger* is that a party . . . must exhaust his state appelate remedies before seeking relief in the District Court." 420 U.S., at 608.

> "Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts. . . .
>
> "Federal post-trial intervention, in a fashion designed to annul the results of a state trial, also deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction. We think this consideration to be of some

> importance because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. Especially is this true when, as here, the constitutional issue involved a statute which is capable of judicial narrowing. In short, we do not believe that a state's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts." *Id.*, at 608-609.

Here, the state proceedings were initiated by respondents rather than by the State. But this only strengthens the rationale for requiring respondents to exhaust their state appellate remedies. Respondents invoked the resources of the State to vindicate what they believed to have been illegal dismissals. Having lost the first round of this contest, they should not be allowed to abandon it and transfer the contest to another arena. As in *Huffman*, such belated forum-shifting is "highly duplicative" and "a direct aspersion on the capabilities and good faith of state appellate courts." Action by a federal district court also would deprive the state appellate courts "of a function which quite legitimately is left to them."

A requirement that respondents exhaust state remedies that they have themselves initiated is particularly appropriate here where respondents' claim for relief rests in part on state law. On appeal, the Georgia courts may well have found that the dismissal of respondents without a hearing was unlawful under Columbus City Ordinance No.71-7, obviating much, if not all, of respondents' federal claim for relief and avoiding

the federal constitutional issues that the District Court may now have to decide. In *Boehning v. Indiana State Employees Association*, 423 U.S. 6 (1975), a discharged employee brought suit in federal court under §1983 alleging procedural due process violations even though "controlling state statutes, as yet unconstrued by the state courts, might require the hearing demanded . . . and so obviate decision on the constitutional issue." *Id.*, at 7. We held that under these circumstances the District Court properly decided to "abstain until construction of the Indiana statutes had been sought in the state courts." *Ibid.* The similar abstention concerns present here, in combination with respondents' invocation of their state remedies, supports the District Court's dismissal of respondents' action because of their failure to exhaust state appellate remedies.

As noted earlier, *Monroe v. Pape*, 365 U.S. 167 (1961), is not to the contrary. In Monroe, we merely held that a federal plaintiff need not *initiate* state proceedings before filing a §1983 action. According to the Court, this conclusion flowed from the purpose of the Civil Rights Act "to provide a federal remedy where the state remedy, though adequate in theory, *was not available in practice.*" 365 U.S., at 174 (emphasis added). Here, after deliberately invoking state review proceedings, respondents should not be heard to challenge the state procedures as either "not available in practice" or otherwise inadequate. Nor indeed have respondents attempted to raise such a challenge.

Quite apart from this distinction, the time may now be ripe for a reconsideration of the Court's conclusion in *Monroe* that the "federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S., at 183. As noted earlier, the Court believed that this conclusion followed from the purpose of the Civil Rights Act "to provide a

federal remedy where the state remedy, though adequate in theory, *was not available in practice.*" *Id.*, at 174. But this purpose need not bar exhaustion where the State can demonstrate that there is an available and adequate state remedy. Indeed, scholarly commentators have soundly criticized the Court for holding to the contrary. See, *e. g.*, Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv. L. Rev. 1486 (1969). In *Monell v. Department of Social Services*, 436 U.S. 658, 663 (1978), the Court, in examining another section of *Monroe v. Pape*, "overrule[d] *Monore v. Pape* . . . insofar as it holds that local governments are wholly immune from suit under §1983." The Court having reopened that portion of *Monroe v. Pape*, I would take the opportunity afforded by this case to reconsider the Court's conclusion as to exhaustion of state remedies. Not only is the Court's conclusion open to serious question, as noted earlier, but the conclusion was reached in an almost off-the-cuff manner, in distinct contrast to that portion of *Monroe* overruled by the Court in *Monell*.

For all of these reasons, I dissent from the denial of certiorari.

APPENDIX D

Robert LEONARD et al.,
Plaintiffs-Appellants,

v.

The CITY OF COLUMBUS et al.,
Defendants-Appellees.

No. 75-2344

United States Court of Appeals,
Fifth Circuit.
May 9, 1977.

Rehearing En Banc Granted July 1, 1977.

Civil Rights Act suit was brought charging racial discrimination in discharge of city policemen. The United States District Court for the Middle District of Georgia, J. Robert Elliott, Chief Judge, dismissed the complaint on jurisdictional and abstention grounds, and plaintiffs appealed. The Court of Appeals, Coleman, Circuit Judge, held that although administrative decision was reviewable in state courts and although claim of wrongful discharge was predicated on both constitutional grounds and alleged misapplication of local ordinance the district court should have decided the case on the merits.

Vacated and remanded.

Federal Courts Key 56

Although decision of police hearing board upholding dismissals of city police officers was reviewable in Georgia courts and although officers' claim of wrongful discharge

was predicated on both constitutional grounds and alleged misapplication of local ordinance, federal district court acted improperly in disposing of officers' Civil Rights Act case on jurisdictional and abstention grounds; district court should have decided the case on the merits.

Joel M. Gora, American Civil Liberties Union, New York City, Ellen Leitzer, American Civil Liberties Union Foundation of Ga., Inc., Margie Pitts Hames, Neil Bradley, Atlanta, Ga., Melvin L. Wulf, American Civil Liberties Union Foundation, New York City, for plaintiffs-appellants.

Lennie F. Davis, City Atty., E. H. Polleys, Jr., Asst. City Atty., Columbus, Ga., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Georgia.

Before BROWN, Chief Judge, and COLEMAN and MORGAN, Circuit Judges.

COLEMAN, Circuit Judge.

Robert Leonard and thirty-seven others filed this action in the United States District Court for the Middle District of Georgia, June 18, 1971, seeking declaratory relief, equitable relief, and damages. As originally cast, the suit alleged that the defendants engaged in certain racially discriminatory employment practices. At the pre-trial conference, however, the suit was radically narrowed, leaving only seven policemen plaintiffs with claims for job reinstatement plus damages for wrongful discharge. Before trial, one of the seven remaining plaintiffs also opted out. Thus, of the original thirty-seven, we now have six left, quite a decimation of forces, to say the least.

After a three day non-jury trial in February, 1975, the

District Court entered an order dismissing the complaint on jurisdictional and abstention grounds. The plaintiffs appeal, asking this Court to vacate the dismissal and to instruct the District Court to decide the case on the merits. Their position is well taken.

The turbulent events from which this case arose have been well documented in other cases. See, *Community Action Group v. City of Columbus*, 5 Cir., 1973, 473 F.2d 966, *reh. den.*, 475 F.2d 1404; *Sumbry v. Land*, 127 Ga.App. 786, 195 S.E.2d 228 (1972), *cert. den.*, 414 U.S. 1079, 94 S.Ct. 598, 38 L.Ed.2d 486 (1973).

The basic facts from which this appeal arose were:

In May, 1971, the Columbus, Georgia, police department employed approximately 318 officers, of whom fifty-two were black. Various black officers including appellants, formed the Afro-American Police League. This was the vehicle by which the black officers presented their grievances to public officials and by which they publicized their complaint of discrimination against blacks within the police department. The goup's activities included issuing a press release which criticized various police activities, holding a press conference on those charges, and formulating a petition of grievances describing their complaints of discrimination within the department.

On May 29, 1971, a black patrolman, John Brooks, failed to appear in court as a witness and was charged with contempt. He was subsequently arrested under the Judge's order. He was also suspended indefinitely on charges of conduct unbecoming an officer and feigning sickness to avoid duty. Due to this, the seven officers picketed the police station on May 29, and 30, 1971. On May 30, a

meeting was held between the disgruntled black officers and various civic leaders. Appeals were made for the patrolmen to return to work. A motion was made that they go back to work, which carried by a split vote. No bargains were apparently struck at the meeting but it was stated that an attempt would be made to confer with officials to see if a solution to the complaints could be achieved.

Later on May 30, Patrolman Leonard was called off his beat and told to report to police headquarters. When he arrived, the deputy chief read a list of charges which were to be directed against Leonard. Patrolman Clark was also called in and presented with various charges.

Upset over what they thought was unfair treatment and a violation of a "cooling off" period allegedly agreed upon, the black policemen met on the morning of May 31 and decided to again picket the police department. Wearing their police uniforms, each of the seven policemen carried hand-lettered signs with statements such as: "We Don't Want to be Policeboys - We Want to be Policemen", and "Afro-American Police League Want (sic) Justice." Later that day, with the news media assembled in front of the station, the seven black officers publicly unstitched the United States flag emblem from their uniforms. They stated that the American flag represented liberty and justice, and they would not wear the flag until they received those things for which the flag stood.

They resumed picketing for a while, but were told to report to the police major's office. When they arrived, they were advised that they had been dismissed from the police force and were given letters explaining their dismissal. The letters stated:

"Effective this date, May 31, 1971, you are

> discharged from the Columbus Police Department for violation of Section 39, paragraphs 'G' and 'R' of the General Rules of Conduct of the Police Manual, which states:
>
> "(G) Conduct unbecoming an officer which might be detrimental to the service.
>
> "(R) Any other act or omission contrary to good order and discipline of the department

in that you did publicly remove the American Flag from the Columbus Police Uniform while picketing in front of Police Headquarters on May 31, 1971.

> "The American Flag was made an official part of the Columbus Police Uniform by a unanimous vote of the City Commission on August 18, 1969.
>
> Very truly yours,
> B.F. McGuffey
> Chief of Police"

Later that day, the Public Safety Director held a press conference at which he read a statement which explained the actions taken by the City in dismissing the officers.[1]

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1. I have this date instructed Chief B.F. McGuffey to dismiss from the Columbus Police Department the following officers:

Patrolman George Arnold
Patrolman J. H. Clark
Patrolman Robert Leonard
Patrolman G. L. Smith
Patrolman W. L. Pearson
Patrolman F. L. White
Patrolman V. Willis

for:

Conduct unbecoming an officer which might be detrimental to the service.

Other acts of omission contrary to good order and discipline

As the case is now presented, the basis of appellants' complaint concerns allegations of procedural defects in the dismissals and discharge for unconstitutional reasons. At the time of the dismissals, City Ordinance No. 71-7 was in effect. This ordinance established disciplinary procedures for the Columbus Police Department. The appellants complain that their dismissals were effectuated without the procedural safeguards afforded by the ordinance.[2]

On June 4, 1971, counsel for appellants wrote the defendants, stating that the discharged patrolmen wished to

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1 (Continued)

of the department.

The Director of Public Safety, Chief of Police and Command Officers have exercised patience and forbearance concerning the conduct individually and as a group by these black officers who call themselves the Afro-American Police League.

Beginning March 26, 1971, and on various dates thereafter, these officers have repetitiously made baseless allegations of unlawful conduct, racism, and discrimination against their fellow officers, the Director of Public Safety, Chief of Police and ranking officers,

They did not present their grievances through channels prior to other public proclamations and accusations.

The F.B.I., Grand Jury, and a Special Committee appointed by the Mayor have addressed themselves to the group's discontents. This obviously has not been satisfactory to these men who are more concerned with publicity than fact.

Today they picketed the Columbus City Police Department and removed the American Flag from their uniforms. These men did not enlist in the Police Department, they do not have to wear that uniform or Flag again; they are dismissed.

2 Although their complaint centers on their being dismissed before receiving a hearing, they also state that they failed to receive prior notice of the charges, did not have an opportunity to respond, and were denied the rights of confrontation and to consult with counsel.

preserve their rights to a hearing before the Police Hearing Board and requested seven days' notice prior to the hearings. On June 10, the Deputy Chief sent a letter to the appellants, replying that each had the right to appeal their dismissals to the Board and that the hearing would be scheduled in the near future. The letters also said that they would be notified of the date, time, and place for the hearing.

On June 18, the present suit was filed in the United States District Court.

On June 24 and 25, the appellants received letters from the Deputy Chief, advising them that their hearings were scheduled for June 28. In addition to restating the charges contained in the original letters of dismissal, these letters set forth additional charges against appellants based on conduct prior to their discharges.[3] At the request of Leonard's counsel, the hearing was postponed until July 9. Five other appellants received a hearing on July 15, White's hearing was held on July 22. The dismissals of Leonard and White were

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3. These additional charges were as follows:

Arnold: Feigning sickness to escape duty; participation in unlawful picket.

Clark: Conduct unbecoming an officer by use of profane and abusive language toward female employees of police department; participation in unlawful picket; absent from duty without leave.

Leonard: Feigning sickness to escape duty; two counts of neglect of duty; participation in unlawful picket; conduct unbecoming an officer.

Pearson: Feigning sickness to escape duty; participation in unlawful picket.

Smith: Participation in unlawful picket.

White: Conduct unbecoming an officer by pawing a stolen movie projector; participation in an unlawful picket; feigning sickness to escape duty.

Willis: Participation in unlawful picket.

unanimously upheld by the Board. The remaining dismissals were upheld on four to two votes. No attempt was made by the plaintiffs to have the Board decision reviewed in the state courts, although such review is available, *Ball v. Police Committee of the City of Atlanta*, 136 Ga.App. 144, 220 S.E.2d 479, 480 (1975).

As noted, following a trial in this action, the District Court disposed of the case on jurisdictional and abstention grounds and did not reach the merits of the plaintiffs' claims. In so doing, the Court stated:

> "It has been observed that the 'Civil Rights Act, unlike federal habeas corpus, does not permit a second bite at the cherry'. *Lackawanna Police Benevolent Association v. Balen*, 446 F.2d 52, 53 (2 Cir., 1971). By attempting to invoke the jurisdiction of this Court after invoking the jurisdiction of the Police Hearing Board, the plaintiffs have sought the forbidden 'second bite'. They seek to relitigate the same cause of action, based on the same set of facts, merely by changing legal theories and sovereignties. They do so despite the availability of a state process of judicial review of decisions of quasi-judicial tribunals such as the Police Hearing Board. (citing *McClung v. Richardson*, 232 Ga. 530, 207 S.E.2d 472 (1974)."

The second factor upon which the District Court based its opinion was that plaintiffs' claim of wrongful discharge was predicated upon constitutional grounds *and* the alleged misapplication of the local ordinance. Accordingly, had the plaintiffs prevailed before any of the four levels of state tribunals available to them there would have been no necessity for the federal action seeking reinstatement. This, said the

Court, presented a classic case for the application of the abstention doctrine:

> "The present case is in essence an employment dispute, involving a local regulatory scheme which is of great interest to the local government, and cases of this genre normally are appropriate for state adjudication. This Court should not serve as an instrument for the disruption of state administrative proceedings conducted on matters of local concern."

The facts and legal issues here presented are not novel. A strikingly similar case was before this Court in *Moreno v. Henckel*, 5 Cir., 1970, 431 F.2d 1299. In *Moreno*, a city security guard was fired for "conduct prejudicial to good order". He appealed the dismissal to the San Antonio Civil Service Committee which remommended that he be reinstated. This recommendation, however, was not followed and the City Manager upheld Moreno's dismissal. Despite the availability to Moreno of adequate state court review, he elected to file a §1983 action in the United States District Court. This suit for injunctive relief, a declaratory judgment, and damages, alleged that he had been discharged in a procedurally defective manner for unconstitutional reasons. The District Court applied the abstention doctrine and dismissed the complaint on the ground that "a remedy was available to the plaintiffs in the Texas Courts". Id. at 1300. We reversed. In so doing we stated:

> "The fact that a state remedy is available is not a valid basis for federal court abstention.
>
> • • • • • •

> "After [Moreno's] dismissal by the City Manager, he was forced to choose between one court and another court to decide his rights under the Civil Rights Act. He made the natural choice. His case turns upon federal rights of a particularly high order.
>
> * * * * * *
>
> "The abstention doctrine is an exception to the litigant's choice of forum, applied 'only in narrowly limited, "special circumstances".'
>
> * * * * * * *
>
> "We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."
> *Moreno v. Henckel, supra,* at 1300, 1307, 1309.

We doubt that this result falls afoul of the recent Supreme Court decision of *Juidice v. Vail,* _____ U.S. _____, 97 S.Ct. 1211, 51 L.Ed.2d 376 (dated March 22, 1977). Therein, the Supreme Court applied the principles of *Younger v. Harris*[4] and *Huffman v. Pursue, Ltd.*[5] to an injunction by the District Court against enforcement of contempt procedures in New York state courts. The High Court there stated that nothing

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4. 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

5. 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

more was required to invoke *Younger* than the party's *opportunity* to present their federal claims in the state proceedings (emphasis in original). *Juidice*, however, involved a writ running from a state court which had jurisdiction to issue it, not the failure to exercise a state court appeal from local administrative action.

We think *Moreno v. Henckel, supra*, teaches that the District Court should have decided this case on the merits. Accordingly, we vacate the judgment of dismissal and remand the case for a decision on the merits, the Court having already conducted a full evidentiary trial in the matter.[6]

VACATED and REMANDED.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before BROWN, C. J., and THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL and FAY, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

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6. On remand, at its initial determination, the District Court may allow the record to be appropriately supplemented.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION NO. 1514

ROBERT LEONARD, et al.,

Plaintiffs

VERSUS

THE CITY OF COLUMBUS, et al.,

Defendants

OPINION

Filed April 17, 1975

This suit stems from certain events occurring during the "Summer of 1971" in Columbus, Georgia. Other groups of plaintiffs have litigated constitutional claims arising during this period, and both federal and state courts have refused to sustain their complaints. See the unpublished opinion of this Court in *Community Action Group, et al. v. City of Columbus, et al. (Civil Action No. 1528 in the Columbus Division, decided January 31, 1972)*, which decision was affirmed by the Court of Appeals for the Fifth Circuit at *473 F.2d 966 (1973)*, and rehearing denied at *475 F.2d 1404*. See also *Sumbry, et al. v. Land, 127 Ga. App. 786 (1972) (195 S.E.2d 228), cert. den. 94 S.Ct. 598*. A reading of these cases gives some insight into the turbulent local "atmosphere" which prevailed during the period referred to.

The present action was brought under the provisions of Sections 1331 and 1343 of Title 28 and Sections 1981 and 1983 of Title 42 of the United States Code. There were originally 38 plaintiffs who requested injunctive and declaratory relief with regard to alleged discriminatory employment practices by the Columbus Police Department, but at the pre-trial conference of January 16, 1975 plaintiffs' counsel abandoned these contentions and stated that the seven remaining plaintiffs, who had been discharged from the Columbus Police Department on May 31, 1971, would pursue only the relief sought in divisions 1, 2, 10 and 11 of the prayers of the complaint which seek damages for wrongful discharge and injunctive relief for reinstatement.

It should be noted at the outset that although the complaint was filed in June, 1971 it was not until December, 1974 that the plaintiffs requested that the matter be set down for trial. whereupon a pre-trial conference was promptly scheduled and the case was brought on for trial on February 10, 1975. By that time not only had 31 of the original 38 plaintiffs withdrawn from the case, but 5 of the 7 individual defendants no longer had any official connection with the City and the Police Hearing Board had passed out of existence.

Since the Court disposes of the case on jurisdictional and abstention grounds and does not reach the merits of the plaintiffs' claim, only a few basic facts need be recited.

The 7 plaintiffs, 6 of whom testified at the trial, were black police officers who were discharged from their positions in the Columbus Police Department on May 31, 1971 as a result of their action in deliberately cutting off American flag insignia from their official uniforms during a picketing demonstration in front of Police Headquarters in full view

of television and other news media. The nub of the problem was not the picketing and the carrying of signs but was rather this abuse of the uniform and the plaintiffs' stated intention to continue to refuse to wear the flag patch. Police Chief B.F. McGuffey signed the May 31 discharge letter and Safety Director Joseph W. Sargis issued a concurring public statement on the same date. The Mayor of Columbus also participated in this decision. These three officials form an executive "chain of authority" under the Charter of the Columbus Consolidated Government.

On June 4, 1971 the attorney for the plaintiffs addressed letters to defendants Sargis, Leavell and Bentley, all of whom were permanent members of the Police Hearing Board, requesting hearings before the Board with regard to the discharges as follows: "This is to advise that my client named above wishes to preserve his rights to a hearing before the Police Hearing Board. I would appreciate at least seven days prior notice of the hearing since it will be necessary for me to arrange my Atlanta court calendar so that I may be present in Columbus for the hearing." On June 9, 1971 plaintiffs' attorney addressed a letter to Mr. Sargis confirming a telephone conversation the same date with regard to the prospective hearings, stating: "We are anxious to have a hearing on these matters and request that all efforts be made to give us an early hearing date." On June 10, 1971 (which was the same day on which he received the letter immediately above referred to), defendant S.W. Brown, Deputy Chief of Police, addressed letters to each of the plaintiffs informing them that a "Police Hearing Board will be scheduled in the near future to hear your appeal and you will be notified of the time, date and place the hearing will be conducted." On June 24 and 25, 1971 Brown addressed notification letters to the plaintiffs and these letters included a number of charges in addition to the incident of

May 31, and Brown's testimony at trial indicated that these charges and supporting evidence were being formulated over a period of time before and after the flag incident. The plaintiffs' complaint was filed in this Court on June 18, 1971, but was not served on the Mayor of Columbus until June 24. Pursuant to their request, three separate hearing boards were convened in July, 1971 to hear the cases of the seven plaintiffs. At these hearings all of the plaintiffs were represented by counsel in the person of Mr. Peter Rindskopf, whose name also appears as co-counsel on the complaint filed in this Court. By its action the Board determined that none of the plaintiffs should be reinstated and they were so notified. No attempt was made by the plaintiffs to review the Board's decisions in the state courts.

It has been observed that the "Civil Rights Act, unlike federal habeas corpus, does not permit a second bite at the cherry". *Lackawanna Police Benevolent Association v. Balen, 446 F.2d 52, 53 (2 Cir. 1971).* By attempting to invoke the jurisdiction of this Court after invoking the jurisdiction of the Police Hearing Board, the plaintiffs have sought the forbidden "second bite". They seek to relitigate the same cause of action, based on the same set of facts, merely by changing legal theories and sovereignties. They do so despite the availability of a state process of judicial review of decisions of quasi-judicial tribunals such as the Police Hearing Board. In *McClung v. Richardson, 232 Ga. 530 (207 S.E. 2d 472) (1974).* in a case dealing with a decision of this same Columbus Police Hearing Board, the Georgia Supreme Court has said:

> " . . . We are of the opinion that in making its decision the board acts in a judicial or quasi-judicial capacity. Therefore, any erroneous decision by the board, which is adverse to an employee, may be reviewed by certiorari

to the superior court." (p. 533)

It is not the proper function of federal district courts to review questions of fact or law to which state officials or judges have addressed themselves.

Although no reference is made in the complaint to the final decision of the Police Hearing Board (because that decision came at the conclusion of the proceedings which the plaintiffs had instituted, and this suit was filed while the proceedings were still in progress), the members of the board are named as defendants and it is clear from the prayers of the complaint and from all the evidence and agrument heard by the Court in this case that the purpose of this suit is to have this Court review and reverse the action of that tribunal.

> "The district court can not do this. The jurisdiction possessed by the District Courts of the United States is strictly original. 'A federal district court has no original jurisdiction to reverse or modify the judgment of a state court,' (citing cases) Federal courts have no authority to act as an appellate arm of the state courts. (citing cases)"
> *Sitton v. United States, 413 F.2d 1386, at 1389 (5th Cir. 1969).*

This Court has had previous occasion to deal with a situation of this nature. In the case of *Moore v. State Highway Department of Georgia, et al., Civil Action No. 945 in the Thomasville Division (1971).* the Highway Department had instituted a condemnation preceeding to take some of Moore's property for highway uses. Moore objected to the taking in the state court proceedings and when the state

court decided the question adversely to him he, instead of continuing the litigation in the state courts by way of appeal, sought to circumvent the state court decision by filing a complaint in this Court seeking an injunction by invoking the provisions of the Civil Rights Act, contending that there was a conspiracy on the part of the defendants to take his property because he was a member of the black race. This Court sustained the defendant's motion for summary judgment and dismissed the complaint, holding that the state trial and appellate procedure afforded the plaintiff a forum in which he could have asserted all of the contentions made in the federal suit and that this was only an attempt to litigate the same cause of action by changing legal theories and forums. This Court's action was affirmed by judgment of the Court of Appeals for the Fifth Circuit. *Moore v. State Highway Department of Georgia, 467 F.2d 944 (1972).*

The fact that the plaintiffs in the present case filed their action before the state tribunal had made its decision and the fact that the matter was not reviewed beyond the level of a state quasi-judicial tribunal should make no difference because of the underlying principle that federal district courts are not appellate tribunals and because of the outright irrationality of allowing jurisdiction to be conferred simply because the plaintiffs failed to present the issues to the state courts and ultimately to the United States Supreme Court.

> "If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal abailable to him."
> *Angel v. Bullington, 330 U.S. 183, 189 (1947).*

Plaintiffs predicate their claim of wrongful discharge on constitutional grounds and on the alleged misapplication of a local ordinance which they ask this Court to construe in their prayers for relief.[1] The present federal action seeking reinstatement would have been obviated had the plaintiffs prevailed in their view before any of the fourt levels of state tribunals available to them - the Hearing Board, the Muscogee Superior Court on a writ of certiorari (Ga. Code Ann. §19-101), the Georgia Court of Appeals on an appeal (Ga. Code Ann. §2-3704 and §2-3708), and the Georgia Supreme Court on another writ of certiorari (Ga. Code Ann. §24-3637 and §24-4537). It was in this same type of situation that the United States Supreme Court created the classic abstention doctrine in *Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941).* In that case an order of the Railroad Commission was attacked on constitutional grounds coupled with a contention that the Commission *exceeded its authority* under a state statute. The Court said:

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication . . . The reign of law

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1 **The second prayer of the plaintiffs' complaint is as follows:**

"2. That, this Court exercise its pendent jurisdiction and Chief of Police, B. F. McGuffey be preliminarily and permanently enjoined from discharging plaintiffs Leonard, Arnold, Clark, Smith, Willis, Pearson, and White *on the grounds that he lacks the power or authority under City of Columbus Ordinance 71-7 to discharge police officers summarily as he did on May 31, 1971* and enjoin the Chief of Police, the Police Department and all other defendants from refraining to reinstate said plaintiffs and from withholding back pay from May 31, 1971." (Emphasis supplied.)

> is hardly promoted if an ununecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."

* * *

> "If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining the Commission's authority." (pp. 500-501)

The Court concludes by saying that the District Court should have stayed its hand.

During its current term the Supreme Court has again confirmed and applied the abstention doctrine in *Harris County Commissioners Court v. Moore, 95 S.Ct. 870 (decided February 18, 1975).* What the court said in that case concerning a Texas statute could just as well be said concerning the Columbus ordinance here under attack:

> "Where there is an action pending in state court that will likely resolve the state law questions underlying the federal claim, we have regularly ordered abstention. . . . Similarly, when the state law questions have concerned matters peculiarly within the province of the local courts. . . . we have inclined toward abstention. . . .

> "Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute the meaning of which is unclear under state law. If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong . . ."
> *95 S.Ct. 870, 875, 876.*

Another form of the abstention doctrine forbidding federal disruption of state administrative processes was enunciated in *Burford v. Sun Oil Co., 319 U.S. (1943).* and the facts of the present case call for a Burford-type abstention as well as the Pullman-type abstention. In *Burford* the state had provided for determination of cases and for formulation of policy by an administrative agency with expeditious and adequate judicial review in the state courts. Instead of following the available state route, the plaintiff filed a federal complaint. In dismissing the federal action the Burford court observed that conflicts of state law interpretation almost certainly would result from intervention by lower federal courts, while if the state procedures were followed ultimate review of federal questions could be had in the United States Supreme Court.

> "Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."
> *319 U.S. 315, 334.*

When the question of the propriety of a federal injunction

against a state regulatory order was again considered in *Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951),* the Supreme Court continued to steer the course set in the leading case. The court observed that the plaintiff had made no showing that the Alabama procedure for judicial review of administrative orders was inadequate and no showing that the procedure prevented the court's review of federal questions unsuccessfully litigated before the state tribunals.

> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights." *341 U.S. 341, 349.*

The present case is in essence an employment dispute, involving a local regulatory scheme which is of great interest to the local government, and cases of this genre normally are appropriate for state adjudication. This Court should not serve as an instrument for the disruption of state administrative proceedings conducted on matters of local concern. The courts in *Indiana State Employees Association, Inc. v. Boehning, 357 F.Supp. 1374 (S.D. Indiana 1973) and Surowitz v. New York City Employees' Retirement System, 376 F.Supp. 369 (S.D. New York 1974)* have reached the same conclusion, and this Court concurs in the reasoning of those cases.

Although we are not asked in this case to enjoin the state court proceedings, we consider it appropriate to recall the doctrine of "equitable restraint" discussed in *Younger v. Harris, 401 U.S. 37 (1971)* and its companion cases as additional authority for the disposition of the case at bar. At its outset, the *Younger* opinion expressed a "national

policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *401 U.S. 37, 41.* More policy is expressed shortly thereafter:

> "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts."
> *401 U.S. 37, 43.*

Subsequent pages discuss the requirements of irreparable injury, bad faith, and harrassment for obtaining injunctive relief. The opinion also makes it clear that the opportunity to raise constitutional claims in the pending state proceeding weighs against federal interference. Although *Younger* arises in the context of a criminal proceeding, nothing in the decision precludes its application to a civil proceeding. For that matter, its policy principles - assuming they be sound - ought to *require* its application in civil preceedings. What's good for "Our Federalism" in the criminal context ought to be good also in the civil context. It appears that the Court of Appeals for the Fifth Circuit in *Duke v. State of Texas, 477 F.2d 244 (1973), cert. den. 415 U.S. 978,* has adopted this view:

> "We iterate that the *Younger* principles of equity, comity and federalism apply to federal intervention in state 'civil' as well as 'criminal' proceedings, even where the exercise of First Amendment rights is involved; tow of our sister Circuits have so held, Cousins v. Wigoda, 7 Cir. 1972, 463 F.2d 603, 92 S.Ct. 2610, 34 L.Ed.2d 15 (Rehnquist, Circuit Justice); Lynch v. Snepp, 4 Cir. 1973,

472 F.2d 769."
477 F.2d 244, 248.

Despite subsequent discussion of the connection between the civil proceeding and penal statutes, the Duke court does not indicate that it will require such a connection to exist in order to validate the above quoted holding:[2] this subsequent discussion perhaps reflects a desire to maintain the closest possible kindship with the factual background of *Younger*. After this and other discussion, the Duke court then expands on the above holding:

> "Thus, the federal court here intruded itself into the processes of state litigation at a time when an adequate appellate remedy was available in the state courts. Such intrusion was improper as disruptive to the delicate balance between federal and state courts implicit in traditional concepts of comity and federalism. As representative of the dominant partner in the necessary interplay between the two sovereigns, federal

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2 Indeed, the Court indicates in its opinion that no such connection is required, the following statement appearing at page 251 of the opinion:

> "It is a time-tested rubric of our federalism that: 'Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exculsion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases.' *Taylor v. Taintor, 1873, 16 Wall, (83 U.S.) 366, 370, 21 L.Ed. 287, 290.*"

courts must be especially sensitive to this balance and assiduous in its preservation . . .

"The plaintiffs below made no effort to utilize orderly state court procedures before resort to the federal system. . . . Other courts have indicated that failure to pursue state appellate remedies is a factor to be considered in refusing federal intervention in an ongoing state civil proceeding, *Lynch v. Snepp, supra, 472 F.2d at 775-776*; cf. *Cousins v. Wigoda, supra, 463 F.2d at 607-608.* A party may not invoke the aid of a federal court, alleging that his state remedies are inadequate, without having first tested the sufficiency of those remedies and having found them to be wanting."
477 F.2d 244, 252.

All that was said in *Younger* and *Duke* also has relevance to the case decided today. And since *Duke* extended *Younger* to cover a civil judicial proceeding, we see no reason why the same principle should not apply to an administrative proceeding which is quasi-judicial in nature. It is recognized that in this case the state proceeding had not been concluded at the time the federal complaint was filed but if the plaintiffs cannot use the federal court to take a second bite at the fruit *after* it has ripened into a state court order, no principle of federalism persuades us to allow them to pluck the fruit *before* it has ripened - particularly when they themselves planted the seeds by solemnly requesting and setting into motion and participating in the procedure for obtaining a state adjudication.

The Court addresses itself to one more doctrine - exhaustion of state administrative remedies - not for the purpose

of invoking it in reaching the conclusion in this case but for the purpose of recognizing its existence and the controversy which surrounds it. The United States Supreme Court has left open the question of whether plaintiffs under 42 U.S.C. §1983 must exhaust their state administrative remedies in appropriate cases. *Gibson v. Berryhill, 411 U.S. 564 (1973).* Judge Noel in *Egner v. Texas City Independent School District, 338 F.Supp. 931 (S.D. Texas 1972)* has written a comprehensive, lucid, and persuasive opinion to the effect that a plaintiff may not proceed under the Civil Rights Act where state administrative and judicial remedies are demonstrably adequate and available both in theory and in practice. There appears to be some conflict in the Fifth Circuit with this conclusion, not only in cases cited in *Egner* but also in the later case of *Polk v. State Bar of Texas, 480 F.2d 998 (5th Cir. 1973)* - which held the *Younger* doctrine inapplicable in a proceeding before a grievance committee of the state bar and which case the Court here finds distinguishable from the instant case because of the conclusion there that the grievance committee action was not a "pending matter" (page 1002, footnote 11) or was "final within the institution" (page 1003). As to this continuing dispute over the exhaustion theory, the Court today declines to enter the fray. However, the Court explicitly concludes that the remedies in the Georgia state courts and under Georgia law were both available and adequate, and, since plaintiffs in this case were already parties to a state proceeding initiated at their request, the Court also expresses the view that if the exhaustion doctrine ever receives unquestioned recognition in this circuit or in the nation, it perhaps will achieve this status in circumstances similar to those present in this case. Certainly "Our Federalism" would be well served by a doctrine which at least said "They who invoke must also exhaust".

A consideration of the foregoing compels this Court to

conclude that the complaint should be dismissed, The jurisdiction of this Court is original, not appellate. This Court has no jurisdiction in this case because it cannot assume the duties of a court of review. Even if this Court had jurisdiction, the various abstention doctrines lead to the same result. The Court recognizes that district courts, particularly under *Pullman*, can retain jurisdiction and stay their hand until the state courts act. However, no purpose would be served here by such a solution. Under *Burford* dismissal is more appropriate. The long delay on the part of the plaintiffs in bringing this cause of action to trial militates against any stays or further delays. The complaint will be dismissed.

This 17th day of April, 1975.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

October 31, 1983

SPENCER D. MERCER
CLERK

In Replying Give Number
Of Case And Name Of
Parties

E. H. Polleys, Jr.
P.O. Box 1340
Columbus, GA 31902

No. 82-8158
Robert Leonard, et al -v- City of Columbus, et al
1514-CV - Dist. Ct. No.

MANDATE STAYED TO AND INCLUDING
December 1, 1983

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to

action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

A copy of the opinion, judgment, or Rule 25 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

SPENCER D. MERCER, CLERK

By: /s/ Irene Hendrix
Deputy Clerk

Encls.

cc: Neil Bradley

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-8158

ROBERT LEONARD, ET AL,
Plaintiffs-Appellants

versus

THE CITY OF COLUMBUS, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Georgia

ORDER:

( ) The motion of APPELLEES, THE CITY OF COLUMBUS, ET AL for [ ] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of APPELLEES THE CITY OF COLUMBUS, ET AL for [x] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including December 1st, 1983, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition

has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ Phyllis Kravitch
United States Circuit Judge

REHG - 6
(Rev. 6/82

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8158

ROBERT LEONARD, et al,.
Plaintiffs-Appellants,

versus

THE CITY OF COLUMBUS, et al.,
Defendants-Appellees.

Filed September 9, 1983

Appeal from the United States District Court for the Middle District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 23, 11 Cir., 1983, _____F.2d _____).
(September 9, 1983)

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing EnBanc

is DENIED.

(x) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

REHG-6
(Rev. 6/82

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8158

D. C. Docket No. 1514-CIV

ROBERT LEONARD, ET AL.,
Plaintiffs-Appellants,

versus

THE CITY OF COLUMBUS ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

May 23, 1983

ISSUED AS MANDATE:

APPENDIX J

OPINION AND ORDER

Filed: Jan. 31, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

COMMUNITY ACTION GROUP, an unincorporated association; MARY BUCKNER; WILLIE PEARSON, JR.; ROBERT LEONARD; RUDOLPH ALLEN; JOSEPH HAMMONDS; WILLIAM T. CRAWFORD; ALFRED RANDOLPH; GARY L. SMITH; HOWARD U. JONES; GEORGE ARNOLD, JR.; JOHN HENRY CLARK; and WILLIAM SMITH; all for themselves and for all others similarly situated,

Plaintiffs,

versus

CITY OF COLUMBUS, a consolidated city-county (Muscogee) government; J. R. ALLEN, Mayor of Columbus; S. W. BROWN, Assistant Chief of Police of Columbus; B. F. McGUFFEY, Chief of Police of Columbus; JOSEPH W. SARGIS, Director of Safety of Columbus; JOHN H. LAND, Judge of the Superior Court for Muscogee County,

Defendants.

This is a class action brought by the Plaintiffs against the above named Defendants by which the Plaintiffs proceed under the jurisdictional provisions of 28 U.S.C. §§ 1331, 1343(3) and (4), and 2201, seeking to redress what the Plaintiffs claim to be a deprivation of rights secured to them by the First, Fourth, Fifth, Sixth, Eighth, Ninth, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, and by 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1988.

The Plaintiffs allege that Community Action Group (hereafter CAG) is an unincorporated association consisting of a large number of black residents of Columbus, Georgia formed for the purpose of conducting marches, parades and demonstrations in the exercise of the rights of free speech, and further allege that the Defendants have entered into a conspiracy among themselves to stifle such activity, and in pursuance thereof have caused a number of members of the black community to be punished for their activity by arrests, intimidation, etc., under the guise of enforcement of certain city ordinances, which ordinances the Plaintiffs allege are unconstitutional on their face and as applied to the Plaintiffs. The complaint further alleges that a state court injunction was obtained and issued as a part of the alleged conspiracy with intention to harass and intimidate Plaintiffs and that such injunction was contrary to Georgia law and void when issued. The relief which the Plaintiffs seek is an order of this Court enjoining any further arrests or other acts of alleged intimidation or coercion which interfere with the Plaintiffs' attempts to exercise their

rights, and the further order of this Court requiring the Defendants to take affirmative action to protect blacks from alleged illegal police action. The complaint also seeks a declaratory judgment by this Court declaring the various city ordinances referred to in the complaint to be unconstitutional and declaring that the state court injunction referred to was void ab initio, and an order requiring the state court judge to set aside any convictions for contempt obtained in connection with the state court enforcement of its injunction.

The Defendants have filed their answers in which they deny the material allegations of the complaint, denying specifically that any of the civil rights of the Plaintiffs have been denied or abridged and denying the existence of the alleged conspiracy. They deny the allegation that the ordinances referred to are unconstitutional and assert that these ordinances have been enforced by them only in the discharge of their official duties as a legitimate exercise of the police power to maintain peace and order in the community, and they assert that the state court injunction complained of was a legitimate exercise of the judicial power of the state court. The Defendants affirmatively allege that instead of being peaceful and orderly, the parades, marches and demonstrations sponsored by the Plaintiffs have produced violence and disorder and have been part of a campaign on the part of the Plaintiffs to harass the City of Columbus and its officials. In addition to the answers filed, one of the Defendants, the City of Columbus, Georgia, has filed a counterclaim against the Plaintiffs alleging that the Plaintiffs

have conspired to cause the City of Columbus harm and damage by committing acts of arson, vandalism, assaults upon police officers and firemen and other acts of violence against the citizens of said city, in consequence of which the City of Columbus in the discharge of its governmental function has suffered property damage, and as a result of the disorder allegedly caused by the Plaintiffs has been compelled to pay substantial amounts as overtime compensation to policemen and firemen, and because of the said alleged unlawful conspiracy and the damages consequent thereto the City of Columbus seeks to recover a monetary judgment against the Plaintiffs.

Full evidentiary hearing was accorded the parties and since prayers for both temporary and permanent injunction are involved in the original complaint it was stipulated that the issues with regard thereto would be submitted without the necessity for further hearing.[1] The Court has made a complete review of the extensive record compiled and now makes the findings of fact and reaches the conclusions of law embodied in this opinion, which is intended as compliance with the requirements of Rule 52 of the Federal Rules of Civil Procedure.

At the time of the beginning of the difficulties hereafter described there were 289 members of the Police Department of the City of Columbus, Georgia. Of this number 52 were black. This number represented a greater percentage of blacks on the police force than

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[1]The issue raised by the counter-claim asserted by the City of Columbus is, of course, not appropriate for consideration in this opinion.

are employed in the great majority of police departments in cities of comparable size throughout the country. Nevertheless, some of the blacks who were employed in the Columbus Police Department were dissatisfied with their status and in the spring of 1971 organized what was known as the Afro-American Police League, which was to give voice to their grievances. This group began holding a series of public meetings and some of its leaders made public speeches and conducted news conferences critical of their superiors in the Police Department. When this activity did not produce the changes which they sought, in the month of May a small group of these black police officers began daily picketing in front of Police Headquarters. They were in uniform and were accompanied by other persons not policemen who were their sympathizers. Once begun, this picketing continued on almost a daily basis, and although this action was in open defiance of their superiors these officers were not discharged from the force and neither were any arrests made in connection therewith, although at times there were as many as 81 pickets engaging in this activity in front of the Police Headquarters, this number being in violation of a picketing ordinance of the city which prescribes numerical limits for such activity. After this had gone on for several days, on May 31 while picketing in front of Police Headquarters 7 black police officers who were participating in the picketing assembled the news media and, after lengthy pronouncements against the Police Department and the Chief of Police and all of their superiors, made a public display of removing the United States flags from their uniforms, the flag being a prescribed part of the uniform. Shortly

thereafter on that day these 7 officers were discharged from the police force for conduct unbecoming an officer and being out of uniform.[2] During the following days a number of mass meetings were organized in the black community by the Afro-American Police League and the picketing continued in front of Police Headquarters.

An atmosphere was thus created which was ripe for exploitation by the prophet, the preacher and the provocateur.

The prophet was one of the black police officers who had been discharged, a Plaintiff in this case, who on June 6 addressed a crowd gathered in connection with the picketing in front of Police Headquarters, stating in substance that the whites would like to know what the blacks were going to do and that he would predict that it was going to be a long, hot summer.

The provocateur was Hosea Williams, an officer of the Southern Christian Leadership Conference, who came down from Atlanta and on June 19 appeared at the Police Headquarters and presented five written demands and by ultimatum gave the Police Department 48 hours to comply with them. The first demand was that all of the black policemen who had been discharged be rehired and their grievances resolved. The second demand was that the Columbus City Council

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[2]No determination is here made concerning the questions raised by these discharged officers relative to their discharge, those being matters to be determined in other litigation now pending in this court.

be reorganized so that half of its members would be black and half of its members would be white.[3] The third demand was that the jail be desegregated. The fourth demand was that 35% of the Police Department be black. The fifth demand was that within 48 hours the Police Department promote 7 black policemen to the rank of lieutenant and promote 3 black policemen to the rank of captain.

The Community Action Group (CAG) had applied for a permit to stage a protest parade on the afternoon of that date and the permit had been granted. The parade was conducted as scheduled. That night the City of Columbus experienced what was to be the first in a long series of firebombings.[4]

On the night of June 21 Williams addressed a black mass meeting at the lodge hall and in the course of his speech he told his audience that "The only thing that white people understand is violence" and reminded them that when the Indians wanted to get revenge on the white man they used the bow and arrow and he suggested that the black man had other means.

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[3]The Columbus City Council is a body which is elected by vote of the people.

[4]The firebombings which will be hereafter referred to were carried out either by the use of what is known as a "Molotov cocktail", which consists of a bottle containing a flammable fluid with a wick extending out of the neck, the wick being ignited and the device being thrown through some opening, such as, a window or a door, into a building or onto the roof of a building, or by the use of a combination of gunpowder and flammable fluid which usually involved entrance into the building which was to be the object of the arson.

Since the firebombings had already started, his audience obviously "got the message" because within a period of hours beginning at 9:10 p.m., on June 21 and ending at 3:19 a.m., on June 22, there were 21 firebombings and 9 false fire alarms.

Mr. Williams addressed other gatherings after this date, but he found it impossible to remain in the city throughout the summer because he had planned a trip to Africa. But just before leaving on his African tour he told some of the leaders in CAG that "he hoped the Negroes burned up Columbus, Georgia so bad that they would have to call him back from Africa to put it out".

The preacher was the Reverend Ralph David Abernathy, the President of the Southern Christian Leadership Conference, who also came down from Atlanta, and on June 28 addressed a large gathering at one of the churches in the black community, the speech also being broadcast over a black-oriented radio station. The Reverend Abernathy, after discussing the many "injustices suffered by the black people" stated that "as we assemble here today we may be launching a new movement that will bring a finish to the injustices put upon the black people". He followed this by saying, "How it grieves me to know that burning must take place in the city, but unless it gets right . . . I tell you that God is going to raise up . . . . Somebody said He destroyed the earth once by water but the next time he wouldn't use water, he will use fire". He also said, "I wish I could say to young people don't burn any more, but I didn't start the burning in the

first place". He followed this by saying, "Faith without work is no good. God helps those who help themselves, He has no hands but our hands". He concluded his references to fire by saying, "It grieves my heart to know that fire must come but I got a message from the young man who told me to tell you today to try and keep it non-violent". In urging other black preachers to relate themselves to the activity he said, "We don't want to hear about Shadrach, Meshach and Abednego in the fiery furnace unless you can relate it to the Columbus fiery furnace".[5]

Since Reverend Abernathy and Mr. Williams are officers in the Southern Christian Leadership Conference, which professes to adhere to the principle of "non-violence", the Court presumes that by their remarks they were suggesting "non-violent" arson, but, whatever the proper adverb, the evidence shows that within a space of a few hours following Reverend Abernathy's address there were 9 firebombings and 6 false alarms in the city.[6]

During the period of unrest beginning June 19 and ending late in the summer there were a total of 161 arson fires and 182 false alarms and these figures include only those occurring between the hours of 8:00 p.m. and 8:00 a.m. The ensuing property damage is

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[5]The preacher did not "take a text", but had he done so he might have found sufficient incitement in Luke 12:49. "I came to cast fire upon the earth; and would that it were already kindled." (Revised Version)

[6]CAG is an affiliate of the Southern Christian Leadership Conference.

estimated to exceed $1,100,000.00. The members of the Fire Department were frequently on duty for long hours, as is indicated by the fact that the City of Columbus was required to expend in excess of $24,000.00 for overtime pay for firemen during the period. Not only was the Department subjected to this stress of overtime duty, but the firemen were frequently subjected to harassment, intimidation, threats and actual injury to themselves and their equipment. During the entire history of the Fire Department prior to June 19, 1971 there had never been any instance in the city when any person had attempted to interfere with the firemen in the discharge of their duties. During this period of turmoil there were many instances in which bricks, stones, pieces of iron pipe, bottles, and other objects were thrown at the firemen as they responded to calls. In some instances the firemen were struck and injured by these objects. In a number of instances the fire trucks were damaged by such objects. There were instances when the firemen would be responding to a call and passing through a black neighborhood when shots in the nature of sniper fire was directed at the firemen and their equipment. In one instance a fire had been built in the middle of a street in a black neighborhood, it being a dead-end street, and when the firemen responded to a call to extinguish the fire and stopped at the scene of the fire they were fired upon from at least two different directions in an attempted ambush. One of the firemen was struck in the leg and the fire truck was heavily damaged, it being necessary to temporarily retire it from use for repairs. The ammunition used by those who were firing at the firemen and the equipment consisted of slugs

and smaller types. The firing came from at least two different directions and the evidence shows that at least three different weapons were used. At one time the situation became so critical until the firemen could not in safety respond to a fire call in certain areas of the city unless they were accompanied by police escort, and in more than one instance policemen were actually required to "ride shotgun" on the fire truck with the firemen in an attempt to protect them. There were also instances in black neighborhoods when the firemen were attempting to extinguish blazes which had been started with incendiary bombs when crowds of blacks gathered at the scene and attempted to physically prevent the firemen from extinguishing the blazes by impeding the movement of their equipment.

There were also instances when blacks cut the fire hoses with knives. There were actually three different incidents of this nature on one night, that being the night of June 20, and at one fire there were three sections of hose cut which had to be replaced at the scene.

There were other instances in which rocks were thrown at the firemen while they were engaged in fighting arson fires, threats and obscenities being shouted at them also.

There were also instances in which blacks who gathered at the scene of a fire attempted to shut off the water at the fire hydrants after the firemen had laid their hoses and begun to direct streams at the fire.

A review of the records maintained by the Fire Department strongly indicates that the firebombing and false alarm activity was being planned or directed. The pattern was for there to be one or more false alarms turned in, this to be followed within a few minutes by one or more actual firebombings, then more false alarms, then more firebombings. An analysis of the records maintained on two typical nights will make this apparent.

On the night of June 19 the first false alarm was turned in at 2307 hours and this was followed by a firebombing 12 minutes later at 2319 hours. Another false alarm was turned in at 2359 hours and this was followed 10 minutes later by a firebombing at 0009 hours, and another firebombing at 0021 hours, and 2 more firebombings at 0053 hours. The next false alarm came at 0144 hours and this was followed 13 minutes later by a firebombing at 0157 hours. At 0201 hours a false alarm was turned in and another false alarm was turned in at 0219 hours, and another false alarm was turned in at 0236 hours. Then these false alarms were followed by 11 firebombings, one each at 0246 hours, 0321 hours, 0325 hours, 0336 hours, 0342 hours, 0426 hours, 0428 hours, 0445 hours, 0516 hours, 0518 hours, and 0532 hours.

On the night of June 28 there were 9 firebombings between 2155 hours on June 28 and 0317 hours on June 29, and on this same night there were 9 false fire alarms. The first 2 of these false alarms were turned in shortly before 2153 hours and the first firebombing occurred 2 minutes later at 2155 hours. The next 3 false

alarms came in between that time and 2224 hours and the next firebombing occurred 5 minutes later at 2229 hours. The next false alarm was turned in at 2224 hours and this was followed by a firebombing 11 minutes later at 2235 hours, and then another firebombing 2 minutes later at 2237 hours. The next false alarm was turned in at 2245 hours and this was followed by a firebombing at 2306 hours, another at 2353 hours, another at 0004 hours on the morning of the 29th, another at 0056 hours, and another at 0317 hours.

The obvious plan was to get the firemen off on a false chase and then start a real fire or fires. Practically all of these false alarms were turned in from predominantly black areas and significantly or not the great majority of those that were turned in through fire alarm boxes came from boxes located within a three block radius of CAG headquarters. Indeed, it eventually developed that so many false alarms were coming in from this area that the Fire Department put these fire alarm boxes out of use.

Very few of the persons responsible for the false alarms and the fires were apprehended, but there was one arsonist who was apprehended as he attempted to set fire to a building on First Avenue in downtown Columbus and there were developments in this connection that are worthy of note. This man was Daniel W. Anderson, a black male with a criminal record who had become active in the CAG activities beginning at the time Hosea Williams made his address on June 19, to which reference has heretofore been made. Anderson thereafter acted as a chauffeur for the South-

ern Christian Leadership Conference staff who came to the city from Atlanta. Anderson was discovered in the building with a quantity of gunpowder and a can of a flammable liquid as he prepared to set the building afire. He escaped from the building, but was apprehended a short distance away. He subsequently confessed and in the course of the hearing conducted in this matter he testified that he along with others had participated in several of the arson incidents which occurred during the summer. He also testified that this particular attempt at arson in connection with which he was arrested was planned by him and William T. Crawford and Jessie James Warren. William T. Crawford is one of the black policemen who was discharged on May 31 and is one of the leaders in CAG and is one of the Plaintiffs in this complaint. Jessie James Warren has also been active in CAG activities and the Plaintiffs have attached an affidavit of Warren to the complaint and have incorporated its allegations as a part of the complaint. Anderson testified that the plan was to burn the building with the fuel and the gunpowder and that Crawford and Warren worked with him in preparing the incendiary material. He states that on the night the arson was to be committed Crawford and Warren took him to the building in Crawford's pick-up truck and the two of them helped him gain entrance to the building by a means which had become known to Crawford while Crawford was working this beat while he was on the police force, and that after he got inside the building Crawford and Warren handed him the incendiary material for his use. He further testified that Crawford attempted to assist him in making an escape after he ran from the

building. He stated that the reason he decided to tell all he knew about the incident was because Crawford and Warren had promised to get him a lawyer and get him out on bond if he should be apprehended, and that they did not carry out their promise.

Anderson also testified that he had heard other firebombings discussed at CAG Headquarters and that during the summer Warren stayed around Headquarters most of the time.

Neither Crawford nor Warren took the stand to contradict the testimony of Anderson.

Subsequent to Anderson's arrest Columbus police, pursuant to a search warrant obtained, made a search of the CAG Headquarters and found, among other things, on the premises a quantity of blank machine gun ammunition casings from which the gunpowder had been removed.

Anderson also testified that on one occasion during the firebombing activity he told Alfred Randolph, a black man active in the CAG organization, that he needed money to buy more gasoline to use in making firebombs and Randolph would not give him any money but allowed him to use his Gulf credit card for the purpose, and that he did use the card and bought gas in containers. He gave the name of the service station where the card was used.

Randolph is one of the Plaintiffs in this case and he has an affidavit attached to the petition which identifies him as being "Chairman of the Public Relations Committee" for CAG. Randolph did not take the stand to contradict the testimony of Anderson.

While the members of the Fire Department were undergoing nightly harassment during the weeks of disorder, they at least enjoyed some respite during daylight hours. Not so with the members of the Police Department. Their ordeal was 24 hours around the clock. Their regular 8-hour shifts were extended to 12 and many of them frequently worked 16 hours. In addition to their usual duties of patroling the city during the night, it was necessary for them to assist the Fire Department in connection with false alarms and firebombings and in protecting the firemen. As might be expected, the firebombings spawned various other incidents of disorder requiring police attention.[7] There were numerous instances in which rocks were thrown through windshields and windows of automobiles and some in which gunfire was directed at passing traffic. There were numerous reports of guns being discharged in the city and numerous instances in which false reports of incidents were made to the Police Department which nevertheless required their attention. During the nighttime hours there were instances when sniper fire was directed at the police patrol vehicles and one instance in which a patrolman was shot while patroling in a black residential area.

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[7] "Double, double toil and trouble;
Fire burn and cauldron bubble."
Shakespeare, Macbeth, Act IV.

The general disorder became so acute that the city officials requested the Governor of the State to station a contingent of State Highway Patrolmen in the city to assist the police in the performance of their duties. The Governor did so and from time to time Highway Patrolmen actively patroled the city in cooperation with the city Police force in numbers varying from a minimum of about 30 to a maximum of about 70.

During the daylight hours the CAG group and their supporters from time to time held mass meetings and conducted parades and engaged in picketing activities. There was almost daily picketing of the Police Headquarters, this picketing being carried on sometimes by as few as 10, or 12, but at other times the numbers were as many as 80. The picketing ordinance of the city does not require a permit, but it does require that persons intending to engage in picketing give prior notice of it. There were instances in which the picketing was carried on without notice and there were instances in which notice was given but then the activity was carried on at a different location. Incident to the picketing which was conducted at Police Headquarters there was considerable harassment of the police as they went to and from Headquarters. Nevertheless, there was only one instance in which any arrests were made in connection with such picketing activity.

The City's parade ordinance requires a permit. In conducting their parades the CAG group sometimes applied for a permit and sometimes did not. Although the parades were held without permit the police did not attempt to prevent any parades which occurred

during the months of June and July until after July 24. Indeed, they assisted the persons engaged in the parade demonstrations by controlling traffic and otherwise providing protection for the line of the parades. This was true although the marchers frequently baited the police who were stationed at intervals along the parade route by the use of profane and obscene language. The officers stood by and allowed these things to go on because they were under instructions not to react unless it was necessary to do so.

Reference has been made to July 24. On that date the leaders of CAG did not apply for a parade permit but announced that a massive march would be conducted from CAG Headquarters through the downtown business section and to Police Headquarters. The march did take place in late afternoon and the police made no effort to stop it and provided the usual escort and protection at street intersections There were about 400 persons in the march and its length was between four and five blocks. As the march proceeded down Broad Street one of the marchers threw a rock through a glass window of a furniture store. Although this was observed by the policemen, no attempt was made to interfere with the progress of the march and the marchers proceeded to Police Headquarters. They assembled in front of Headquarters where they completely blocked traffic in the street for a period of 45 minutes, during which time they heard speeches from various leaders of the group, during the course of which the Police Department was condemned and th. privilege of "free speech" was thoroughly exercised. A senior police officer present at Headquarters then directed

that the crowd disperse. After some reluctance they did so and proceeded to continue their march toward the point of origin, CAG Headquarters. After the march had proceeded where the rear portion had reached a point about one block from Police Headquarters a large number of the marchers, variously estimated by the witnesses to be anywhere from 50 to 100, began throwing rocks, flattened beer cans, and other miscellaneous missiles, at the police officers who were stationed at a street intersection through which the march was passing. Two of the officers were struck by some of the rocks. Upon being advised of this situation the Chief of Police decided that this was a matter which could not be ignored and he directed that the marchers be dispersed, whereupon the police detail stationed at Headquarters, assisted by a number of Highway Patrolmen, did proceed to the area of the march and directed that the marchers get out of the street and leave the area. Practically all the participants in the march did comply with the order, but some resisted. A brick was thrown through the windshield and a headlight was kicked out of a marked police vehicle and five police officers were injured in various degrees to an extent requiring medical attention. Eight of the marchers were placed under arrest by the police and some of these had likewise sustained injuries requiring medical attention.

Soon after darkness arrived it became apparent that this was to be a night of general disorder, as indeed it turned out to be, there being a total of 12 firebombings and a number of false alarms within a period of 6 hours.

In this situation the City Council, which is the governing body of the city, met in emergency session and adopted an ordinance conferring certain emergency powers upon the Mayor of the City, the ordinance reciting that, "Whereas, the Council of Columbus, Georgia deems it necessary for the protection of life and property and for the preservation of the public peace and safety to grant certain executive powers to the Mayor during the existence of a civil emergency". The ordinance authorized the Mayor to proclaim a civil emergency and, having done so in the interest of public safety, to issue certain orders, enumerating them, and including the further provision that the Mayor was empowered to "issue such other orders as are imminently necessary for the protection of life and property". The last section of the ordinance recited "that an emergency is hereby declared to exist for the preservation of the public peace, health and safety, by reason whereof this ordinance shall take effect immediately". Immediately after the adoption of this ordinance the Mayor of the City in the exercise of the power conferred upon him declared a state of emergency to exist within the city and directed that "All persons are hereby prohibited from gathering on the public streets or sidewalks in groups of twelve (12) or more", and providing penalties for violation of the proclamation. It was provided that the proclamation was to become effective immediately and remain in effect until terminated by proclamation.

During the next six days CAG did not attempt to conduct any more marches, but on July 30 they made public announcement that they would ignore the May-

or's proclamation and intended to stage a massive march and demonstration on Saturday afternoon, July 31. Whereupon, the Mayor of the City on Saturday morning, July 31, made application to Judge John H. Land, Judge of the Superior Court of Muscogee County, Georgia for injunction forbidding the carrying out of the proposed march for reasons asserted in the application. Pursuant to this application Judge Land issued a temporary restraining order enjoining the persons named as Defendants in the matter and those associated with them from conducting the march planned for that afternoon and authorizing the appropriate law enforcement officers to enforce the injunction. The Judge's order was made known to the marchers and only a relatively small number attempted to conduct the march. About 90 did attempt the march and were taken into custody and cited for contempt. When, with the passage of some time, it became apparent that a degree of order had been restored in the community Judge Land dissolved his injunction, the Mayor of the City rescinded his proclamation, and the City Council rescinded the emergency ordinance. Judge Land took his action on August 25, the Mayor and Council taking their action in early September.

One of the contentions of the Plaintiffs' complaint is that the action of the City Council in adopting the emergency ordinance was the result of a "plan" or "conspiracy" to "abridge" the rights of "black people", and that in issuing the emergency proclamation there was a failure to give "scrupulous" regard to the Plaintiffs' right of freedom of assembly. The Court

notes in passing that the ordinance was adopted by the unanimous vote of the City Council with all members being present and that two of the members of the City Council are black. The Court further observes that if there were in fact any plan or conspiracy which prompted the adoption of the ordinance the action would certainly have been taken prior to July 24. During the weeks preceding the night of July 24 the City government had been obviously attempting to avoid taking any action which could have been given any interpretation as aggravation of a situation which all hoped would in time correct itself. Indeed, if any criticism of the Mayor and Council is due it would probably be that they delayed too long in taking affirmative action. The evidence indicates that if the City Council had continued to fiddle, the City might have suffered the same fate as Nero's Rome. The Council being responsible for the safety of a city being threatened with destruction by guerrilla tactics, for it to be said that the paramount consideration should have been to do nothing that might in some way temporarily impinge upon the Plaintiffs' rights of freedom of assembly is like saying a father should not shuck his clothes and swim to save a drowning child because his nudity might offend the sensibilities of onlookers.

Plaintiffs also contend that the action of Judge Land in issuing the state court restraining order was contrary to Georgia law and was part of a conspiracy between the Judge and the Mayor and the other Defendants in this case to deny the Plaintiffs their constitutional rights and ask this Court to declare Judge Land's order void. Insofar as the allegation of conspir-

acy is concerned there is no evidence in the record whatever to support such a contention and the Court concludes that such conspiracy in fact did not exist. And with regard to the question of validity or invalidity of Judge Land's injunction, it appears that all of the adjudications of contempt for alleged violation of the state court injunction are now matters which are the subject of an appeal which is impending before the Georgia Court of Appeals, and the question whether the injunction was contrary to state law and therefore void is raised by these appeals and should be determined in that proceeding by the state court and not by this Court in this proceeding. The doctrine of abstention requires that this Court in the circumstances refrain from any adjudication with regard to that matter.

Another allegation made in the complaint and elaborated upon by Plaintiffs' counsel during the course of hearing on this matter was that the combination march-demonstration which took place on July 24 was orderly and peaceful and that the marchers gave the police authorities no cause to disperse the march and that such action was taken by the police solely for the purpose of harassing the marchers and denying them their right of free speech. A review of the facts clearly demonstrates that this contention is without foundation. First, the marchers did not have a permit to parade, as required by city ordinance, and if the police authorities had wished to do so, under the provisions of the ordinance they could have stopped the march immediately upon its beginning when the marchers left CAG Headquarters. Instead, they pro-

vided the march with an escort. Second, if the police were simply looking for an excuse to disperse the marchers, even after the march began they had ample basis for doing so when the marchers knocked out a window in a business establishment on the main business street of the city, but the police took no action. Third, if the police had wished to interfere with the conduct of the march they could have forbidden the marchers to mass in front of Police Headquarters in such fashion as to completely block traffic. Fourth, if the police had wished to deprive the marchers of any right of free speech they could have refused to allow the leaders of the march to address the crowd through bull horns as they were assembled for 45 minutes in front of Police Headquarters. Instead, they took no action until it was apparent that everyone had had ample opportunity to speak as freely as desired, and then the only action taken was to remind the marchers that they had had ample time and that they would now have to move on.

The police took no action whatever to interfere with the march until the marchers assaulted the policemen along the route of the march after the marchers had left Police Headquarters, and in dispersing the marchers the police made only eight arrests out of a crowd of approximately 400. This evidence is entirely inconsistent with any suggestion that the action of the police in dispersing the marchers was with the intention of harassment or of denying them any constitutional right.

Another charge put forward by the Plaintiffs during the course of the hearing on this matter was to

the effect that the arrest of the persons who participated in the abortive march of July 31 was unjust harassment of these persons because the restraining order had not been issued far enough in advance for the marchers to have knowledge of its existence, contending that the first communication to them of any information concerning the injunction was by way of loud speaker from a police helicopter which hovered over the march after the march got under way and that this transmission from the helicopter was unintelligible to the marchers, the implication being that the marchers were trapped into exposing themselves to arrest when they otherwise would have not done so.

While there was ample evidence presented by the Defendants to contradict this assertion, we need look no further than the testimony of two of the Plaintiff's own witnesses to see that this contention is without foundation. Indeed, the first witness who testified for the Plaintiffs, Barbara Collins, stated that the marchers were at CAG Headquarters preparing to march and that a representative of the Sheriff's Department arrived and served a copy of Judge Land's injunction on the leader of the march, Joe Hammonds, and that the injunction was read to the assembled marchers before they left the Headquarters, but they decided to march anyway. She testified that the marchers knew that they would be arrested because they knew of the injunction and knew that they did not have a permit, but they went ahead because they had been told by the leaders of CAG that lawyers and bail would be provided for them. Another of the Plaintiffs' witnesses, John Harris, confirms the testimony of Bar-

bara Collins that the injunction was read to the marchers before they left the CAG Headquarters. This makes the question of whether they heard the injunction read from the helicopter immaterial.

The Plaintiffs' complaint alleges that during the course of the summer disturbances police officers made numerous unjustified arrests of blacks and subjected those arrested to abuse as a part of a plan to intimidate black citizens. At one place the complaint refers to "arrests". At another place it refers to "mass arrests". The Plaintiffs presented evidence only with regard to a few arrests. The Defendants responded by presenting evidence with regard to these same incidents. An evaluation of this testimony follows.

The Arthur Thompson Incident

Arthur Thompson is a black man who testified that he was on his way home on the night of July 24 at about 10:00 o'clock when he was approaching the intersection of Cusseta Road and Twentieth Avenue and that eight police cars came up behind him and stopped him. At another point in his testimony he says that there were eleven police cars that came up behind him and stopped him, and that eight of the cars stopped in front of him and three or four behind him. At another point in his testimony he says that four of the cars stopped in front of him and four stopped behind him. He further testified that all of these officers in these police cars which he estimated to number between 30 or 35 came to his car and ordered him out of the car and searched him and arrested him for no cause at all and put him in a police car and took him to the

police station, and that when they got him to the police station they dragged him out of the car at the back of the police station and that then ten policemen beat him with "billy clubs, shotgun butts and everything", and that as a result of the beating he sustained various personal injuries which he described. He further testified that there was another man with him by the name of Eddie Bradley and that he was taking his friend Bradley home and that Bradley was also arrested and observed all of this.

The two police officers who participated in this arrest gave a different version. Richard A. Robinson testified that at about 10:00 p.m., on July 24, he and Bruce L. Robinson were on route patrol and responded to a police radio call to go to the Cusseta Road — Twentieth Avenue intersection where another officer had just been shot by sniper fire. When they arrived at the scene there were several other patrol cars already in the area which were parked alongside the curb and a good bit of automobile traffic had been attracted to the area by the disturbance, so, traffic being congested to the extent that only one lane of traffic could move at a time, he took a position in the street under a street light and used his flashlight to direct traffic. He was stopping one lane and letting another lane go alternately. He testified that after he had been in this postion for a few moments a car approached him with its bright lights on and ran right up to him coming to a sudden stop as if to strike him, and a black male, later identified as Arthur Thompson, leaned out of the driver's side window and shouted to him to get out of his "God damn way". Robinson reached and opened the door to Thompson's automobile and Thompson

stepped out of the car with his fists up and clinched in a fighting stance. In this situation Robinson struck Thompson across the forearm with his billy club and placed him under arrest. He further testified that he, in the company of two other officers, later took Thompson to Police Headquarters and that he took Thompson inside the jail and stayed with him the entire time until he was booked and turned over to the jailer. He states that neither he nor anyone else at the jail struck Thompson in any way and that Thompson never made any complaint at any time that anyone had beaten him. He further testified that all of the police cars present in the area were already there and had been there for several minutes before Thompson ever arrived at the intersection.

Bruce L. Robinson testified to substantially the same facts as Richard A. Robinson.

In addition to being self-contradictory and somewhat incredible on the surface, the Court notes that Thompson's friend Bradley did not appear to testify in confirmation of Thompson's testimony, nor was any medical evidence offered to support his claims with regard to the injuries allegedly sustained, nor did Thompson offer to display to the Court any indication of such. It also appears from the record that Thompson appeared in Recorder's Court the morning of July 25 and was adjudged guilty in a charge of resisting arrest and there is no indication that he made any complaint of any nature to the Recorder's Court judge.

The Court finds that the testimony of Thompson is not consistent with the facts.

The Gary L. Smith Incident

This man is one of the black officers discharged on May 31 and evidence was introduced by the Plaintiffs in the form of Smith's testimony in an effort to show that Smith was arrested and abused for no just cause and only because he was one of the discharged officers.

Smith testified that he was present and participated in the demonstration in front of Police Headquarters on the afternoon of July 24 and participated in the march before it arrived at Headquarters and after it left Headquarters, and was present at the time the march was eventually broken up. He says that later that night he was parked in a car in a parking area near the intersection of Buena Vista Road and Lawyers Lane when a number of police cars pulled in and that the policemen forced him to get out of the car and searched him and that as he started to leave they stopped him and arrested him and proceeded to beat him up, hitting him on his head and in his face with night sticks. He says he was then handcuffed and that while he was handcuffed they hit him in the face and tried to choke him and continued to beat him, and that as he was being put in the patrol car a police officer kicked him and that after he was placed in the car an officer reached through the window of the car and hit him in the face with a night stick and also beat him on the head with a night stick.

In contradiction of Smith's version a police Sergeant who was present at the time and two other police officers who participated in the arrest of Smith testified that at about 1:30 a.m. on the morning of July 25 they went to the intersection of Buena Vista Road and Law-

yers Lane because there had been some sniper fire directed at a police patrol car in that area and that they found a large crowd of blacks gathered in the area where several cars were parked. They ordered the crowd to break up and practically all of those present did so. When Smith got in his car to drive off the Sergeant noticed some 30-30 rifle ammunition on the ground in the area immediately beneath the window of the driver's side of the vehicle which was occupied by Smith. Observing this, he directed that Smith be stopped, and a search of the car revealed a 30-30 rifle. Smith was arrested, and all of these officers testified that he was not mistreated in any way, but was transported to Police Headquarters and booked.

Several circumstances cast considerable doubt on the correctness of Smith's version of this incident. First, if the police officers were simply looking for some excuse to arrest Smith they had ample opportunity to have done so at the time the marchers were being dispersed on the afternoon of the 24th. No such arrest was made. Second, although a number of other persons were present at the time Smith was arrested in the early morning of July 25, none of them testified in substantiation of Smith's charges. Third, the record does not show that Smith had any difficulty in appearing in the Recorder's Court nor that he made any complaint in the Recorder's Court concerning any mistreatment. Fourth, if Smith was in fact beaten to the extent his testimony indicates he would almost certainly have required medical attention, yet no medical evidence was offered and Smith did not display to the Court any scars or other physical signs of such abuse. It is true that in response to a leading question pro-

pounded by counsel for Plaintiffs, Smith stated that he *later* went to a hospital, but we have only his bare statement to that effect and no supporting evidence of any kind.

Since one of the charges made against Smith was that of resisting arrest, the Court concludes that it is probable that the officers were required to use some force in making the arrest, but that Smith's version is greatly exaggerated.

The Robert Leonard Incident

This man is the head of the Afro-American Police League and was one of the officers discharged on May 31 and he testified that he was one of the leaders of the march on July 24. He says that when the marchers were being dispersed he saw a woman who seemed to be having some difficulty and that he was trying to help her by walking with her and that officer Billy Watson struck the woman with his billy club and that he bent over to pick her up. He identifies the woman as Mrs. Betty Williams. He says that when he bent over to pick the woman up Watson hit him in the head with the club, knocking him to his knees, and that when he tried to get up officer George A. Pearson hit him in the back of the head with a club and knocked him down. He says that officer David Vester then came and began kicking him and stomping him. He says that he got up and tried to get away, but Vester and Pearson continued to beat him with their clubs. He says that another ex-Negro policeman by the name of Gary Smith came to his aid. He further testified that when he "came around" he was in a hospital

He says that he was later arrested on a warrant for assaulting an officer.

Each of the officers named by Leonard testified in contradiction of his testimony. Officer Watson testified that he did see Leonard in the crowd and that at the time he saw him Leonard was standing beside a black female and that he directed Leonard to get off of the street and that Leonard told him that he was assisting the woman and that he then told him that they would both have to get out of the street because it did not appear to him that the woman was in any difficulty whatever. He denies striking the woman and he denies striking Leonard and he denies that the woman at any time fell to the ground. He says that he walked away from where Leonard was after he had given the directions to get out of the street. Watson says that Officer George Pearson was not even in the general area when he first observed Leonard and that Pearson did not strike Leonard. He says the only conflict he saw between Leonard and anyone was when a few moments later he saw Leonard and Officer Vester having some difficulty and that at that time he saw Leonard strike Vester, and having struck Vester that Leonard turned and ran from the scene. He says the woman he had previously seen with Leonard was nowhere around when Vester and Leonard were having their difficulty. He did not see Vester strike Leonard at any time.

Officer David Vester testified that he saw Leonard and told him to move on as he was telling others to do and that Leonard at first made a movement as if to leave, but then suddenly turned back and hit him on the side of his head near the right ear and then "ran like a rabbit", and that he did not see Leonard

again that day. He says that he never struck Leonard nor did he see any other officer strike him. On Vester's return to Headquarters a warrant was issued for Leonard's arrest for assaulting an officer.

Officer George A. Pearson testified that he never saw Leonard in the presence of Officer Watson. He says the first time he saw Leonard was when he was some ten yards away and saw Vester telling Leonard to move on and then he saw Leonard turn and strike Vester with his fist, and then saw Leonard run away. He says he tried to head Leonard off, but that he was not able to catch him. He says Vester did not strike Leonard and he says he never touched Leonard because the closest he came to him was about ten yards. He saw no one hit Leonard.

Several things are noted with respect to Leonard's testimony. First, there were two witnesses who appeared for the *Plaintiffs* who testified contrary to Leonard's testimony. Barbara Collins says that she saw Leonard as he was attempting to assist Betty Williams, but did not see the police officer who approached them strike Leonard. It will be remembered that Leonard said that he was struck by the same officer who struck Betty Williams and was struck at the same time. The officer who is alleged to have struck Betty Williams is Officer Watson, so this would indicate that Watson did not strike Leonard.

Second, Leonard testified that ex-officer Gary Smith came to his aid, but when ex-officer Gary Smith testified, as a Plaintiffs' witness, he said nothing about going to Leonard's aid and he said that while he saw

police officers striking people, he did not see the police officers strike *anyone he knew*. Certainly Smith knew Leonard because they were two of the seven officers discharged on May 31 after the flags were removed from the uniforms and they had jointly participated in the picketing activities and in the marches. Further, since Leonard was the head of the Afro-American Police League, it is hardly likely that his identity was unknown to his fellow black officer.

Third, Leonard is acquainted with the woman he claims to have been assisting on this occasion because he identifies her by name. Yet Mr. Williams never appeared to testify in confirmation of Leonard's version of this incident. It would certainly seem that if she was the object of his concern and, therefore, the occasion for his difficulty, she could have been made available to substantiate the testimony of her benefactor.

Fourth, there was no evidence from any independent source of any medical treatment of Leonard or any hospitalization.

Lastly, the circumstantial evidence supports the version of the police officers because the testimony of the police officers that Leonard struck Officer Vester and then ran away is consistent with the action of the police officers in going back to Headquarters and having a warrant issued for his arrest for assaulting the officer, for if he had not run away they would have arrested him on the scene without the necessity of having a warrant issued.

The William T. Crawford Incident

Crawford was arrested in connection with the march of July 24.

Crawford testified that he was not participating in the march and was only observing it. He says that while he was observing the march officer Billy Watson arrested him for no reason at all and that as he was leaving the area in the company of Officer Watson that Detective Harvey Johnson attempted to hit him with a night stick and that then "15 or 20" other officers began to beat him for no reason. He says that he did not resist arrest in any way and did not say anything to the officers and was not interfering with the officers in the performance of their duties.

No witness testified in confirmation of Crawford's testimony. Several witnesses testified in contradiction.

Officers Richard A. Robinson and Grover L. Knox both testified that Crawford was actually participating in the march, being in the street with the marchers.

Officer Donald F. Grantham testified that he was one of the officers proceeding to the area of the march to disperse the marchers and as he reached the area he was headed toward the center of the street to assist an officer who appeared to be having some difficulty in the crowd and in doing so he noticed Crawford standing on the corner and had intended to go by him. He says that he did not say anything to Crawford, but as he went by Crawford, Crawford struck him in the left eye with his fist and knocked him backward, and

that as he turned from the force of the blow he grabbed Crawford's shirt and pulled him back toward the ground with him and Crawford fell on top of him. Crawford attempted to hit him some more, but he was able to ward these blows off. His eye was filling with blood from the blow as he observed two other officers approaching to assist him, but he could not say who these officers were. He says that he never hit Crawford because they were locked together on the ground.

Officer Billy Watson testified that he saw Crawford standing on the corner as the crowd was being dispersed and that as Officer Grantham passed Crawford headed toward the center of the street he saw Crawford hit Grantham in the face with his fist. When he saw this he went to Grantham's aid. He says that as Crawford and Grantham were struggling together on the ground he observed Crawford was trying to reach for something under his shirt and somebody yelled, "Watch it, he has got a gun". At that time he struck Crawford one time with his night stick. It was discovered that Crawford did have a nickel-plated revolver under his shirt in a shoulder holster. He says that Crawford was handcuffed and placed in a police car and taken to Headquarters. He denies that anyone beat Crawford after he was handcuffed or after he was placed in the patrol car.

Officer Ronald W. Lollar testified that he had seen Crawford with the marchers earlier and that he later went with the group of officers to disperse the march and while there he saw Crawford on the ground and some police officers were trying to hold him, that he

went over to the area and saw the pistol removed from under Crawford's shirt, that Crawford was still struggling with the officers in an attempt to free himself, so he placed handcuffs on him. He assisted in getting Crawford up off of the ground and at that time observed that Crawford was bleeding from a scalp wound. He was one of the officers who assisted in placing him in the patrol car.

Detective Johnson denies that he at any time attempted to strike Crawford and he says in fact that he did not even participate in dispersing the marchers, but remained at Police Headquarters the entire afternoon of July 24.

The evidence shows that Officer Grantham, who was the one allegedly struck by Crawford, was taken to the hospital and had a laceration over his left eye sutured. The evidence also shows that Crawford later received emergency treatment at the hospital for the scalp wound heretofore referred to. Crawford was charged with simple assault and resisting arrest.

The weight of the evidence is not in support of Crawford's version of this incident.

The Richard Diamond Incident

The Court also heard the testimony of Richard Diamond, a white man who was participating as a marcher or as a news reporter, or as both, in the march of July 24 in which he accuses the police of abuse and arrest without provocation, and then heard the testimony of several police officers who were at the scene

who testified that Diamond precipitated the arrest when he refused to disperse and then struck Detective R. A. Jones with a camera which Diamond was carrying. Diamond was charged with assaulting the officer, and the Court takes judicial notice of the fact that since the conclusion of the hearing in this matter Diamond has been tried by jury in the state court and convicted of the assault charge and now has his conviction on appeal. For this reason the Court deems it inappropriate to evaluate the evidence about this incident.

The foregoing is a summary of the evidence with regard to individual arrest incidents. The CAG activities began in May and continued through the summer and it will be observed that each of these arrests complained of was made within a span of a few hours on the evening of July 24 or the early morning of July 25, and even if we should accept the testimony of those arrested at face value, which we do not, it clearly would not support the contention made by the Plaintiffs in this action that the evidence shows a pattern of arrests and beatings and mistreatment during the period of these disorders as referred to in the complaint. The only evidence with regard to "mass arrests" had to do with some arrests which took place in connection with a picketing incident in front of Police Headquarters on June 21 and the arrest of the marchers who were taken into custody on July 31 and there is no evidence whatever of any abuse or mistreatment of any person arrested on those occasions.

When this complaint was originally presented to the Court there were 23 affidavits attached to the petition

which purported to paint a picture of what counsel for the Plaintiffs refer to as "police brutality", but these affidavits are not evidence in the case, and the Court notes that when the case came on for hearing only five of the twenty-three affiants were willing to appear to testify, three of those being the Plaintiffs' witnesses whose testimony has heretofore been analyzed. Obviously, those affidavits were attached with the thought of persuading the Court to issue an immediate restraining order as requested by the Plaintiffs without giving the Defendant an opportunity to test the affiants by cross-examination. Incidentally, the reliability of such affidavits may be judged by examining the affidavit of Jessie James Warren in the course of which he swears that he saw 15 officers beat Pete Leonard with clubs on July 24. "Pete" is the nickname of Robert Leonard and we have already noted that Robert Leonard testified upon the hearing of this matter that he was beaten by three officers — not fifteen. Certainly he would not be inclined to minimize the matter.

Various allegations of the complaint are without any evidence whatever to support them. For instance, Paragraph 11 of the complaint alleges as a basis for the relief sought the alleged unlawful arrest of Willie L. Pearson, Jr., one of the named Plaintiffs in the case, and the same paragraph alleges as a basis for the relief sought the alleged unlawful arrest of George Arnold, one of the named Plaintiffs in the case, and the same paragraph alleges as the basis for the relief sought the alleged unlawful arrest of Willie Ware. Neither Pearson nor Arnold nor Ware testified in sup-

port of these allegations. Indeed, neither of them appeared as witnesses with regard to any matter.

Paragraph 15 of the complaint alleges as a basis for the relief sought that "on the night of July 24 random, general searches were carried out in the black community, in homes, cars and on the streets and sidewalks". The Court heard no evidence concerning the search of any home, random or otherwise. The only evidence about the search of a car was concerning the search of a car in which a 30-30 caliber rifle was discovered, and the only search of a person had to do with the customary frisking procedure employed when a person is being taken into custody.

There are twelve individuals named as Plaintiffs in the complaint, but only three of these appeared to testify with respect to any matter, these three being Robert Leonard, William T. Crawford and Gary L. Smith, and reference has already been made to their testimony.

The Plaintiffs' case is long in allegations, but short on proof.

The Court had opportunity to observe all the witnesses and hear their testimony and, after having made a complete review of the record and having applied the usual tests to determine credibility and weight, the Court has determined that the Plaintiffs have not carried the burden of proving their contentions made and are, therefore, not entitled to the relief sought.

There is no equity in the complaint. Therefore, all of the injunctive relief prayed for is denied.

With respect to the attack made by the Plaintiffs on the various city ordinances referred to in the complaint, the Court finds that the arrests which have been made were made in good faith and not for the purpose of harassment and intimidation, and the prosecutions are proceeding in good faith. The evidence does not support the contention of the Plaintiffs that there existed a plan or conspiracy on the part of the Defendants, or any of them, to make arrests under the provisions of the city ordinances or by the use of other judicial process to deprive the Plaintiffs or members of their class of any constitutionally protected right.

All of the prosecutions complained of were initiated and pending in the state courts at the time this action was filed in this court. The persons who have been convicted in the Recorder's Court of the city for violations of these various ordinances have made their applications for jury trial in the state court, as they have the right to do under state law, and they are there raising the same constitutional questions with regard to these ordinances as are now raised here by application for declaratory judgment.

In this situation, having determined that the Plaintiffs are not entitled to the injunctive relief sought, it would be improper for this Court to consider the entry of declaratory judgment with respect to the constitutionality of these ordinances, which question can be, should be and will be determined by the state court.

See *Samuels v. Mackell, 401 U. S. 66, 27 L.Ed.2d 688 (1971)*, and *Hammond v. Brown, 450 F.2d 480 (6 Cir. 1971)*.

Accordingly, the prayer for declaratory judgment with respect to the city ordinances referred to is also denied.

IT IS SO ORDERED this 31st day of January, 1972.

/s/ J. ROBERT ELLIOTT
UNITED STATES
DISTRICT JUDGE

APPENDIX K

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

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28 U.S.C. § 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the

matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

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28 U.S.C. § 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000 computed without regard to any setoff or counterclaim to which

the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

As amended Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721.

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28 U.S.C. § 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

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28 U.S.C. § 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12(p), 72 Stat. 349.

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28 U.S.C. § 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or

not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

As amended Oct 4, 1976. Pub.L. 94-455, Title XIII, § 1306(b)(8), 90 Stat. 1719.

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28 U.S.C. § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

AN ORDINANCE
No. 71-7

An Ordinance amending the Code of Ordinances of Columbus, Georgia, providing for disciplinary procedures for the Columbus Police Department.

THE COUNCIL OF COLUMBUS, GEORGIA, HEREBY ORDAINS:

SECTION 1.

That the Code of Ordinances of Columbus, Georgia, be and the same is hereby amended by adding to Chapter 17 thereof, a new Article III to read as follows:

"CHAPTER 17

"*ARTICLE III — DISCIPLINARY PROCEDURES*

"*Sec. 17-34. Purpose.*

"To establish procedures for the prompt and thorough investigation of alleged or suspected misconduct of commissioned officers of the Columbus Police Department, including violation of statutes, ordinances and departmental rules and orders by sworn members of the department, but specifically excluding civilian employees.

"*Sec. 17-35. Authority and Responsibility.*

"Each member of the Department will perform the duties and assume the obligations of his rank in the investigation of complaints or allegations of misconduct against members of the Department and will cooperate fully with the personnel conducting the investigation. Supervisory and Command Personnel will themselves initiate investigations when the subject complained about or observed in connection with an infraction is within the scope of their authority.

"*Sec. 17-35.1 Same — The Internal Investigation.*

"Internal investigations will be initiated by the *Deputy Chief of Police* who will exercise staff supervision over all personnel investigations, and provide information and investigative assistance to all divisions of the Department as may be required to maintain Departmental integrity. With the exception of minor infractions which Commanding Officers are expected to resolve, all alleged or suspected actions of Departmental personnel that involve the possible commission of a criminal offense, misconduct, neglect of duty, or other violation of Departmental

rules or orders must be reported to the Deputy Chief of Police. This report will be made by the Superior or Commanding Officer who first receives information of an alleged violation, even when it is believed to be unfounded. Anonymous reports will be forwarded in the same manner as those in which the complainant is identified.

"*Sec. 17-35.2. Same — Exceptions to these Requirements.*

"1. Complaints relative to difference of opinion between Police Officers and citizens over the issuance of traffic citations do not come under the purview of this order. However, where a traffic case also involves an allegation that a Police Officer was in violation of law or Departmental rules, an investigation restricted to the allegation of misconduct will be conducted in conformity with the procedures established by this Article.

"2. When an alleged or observed infraction does not involve persons outside the Department and is of a minor nature, Commanding Officers will not look to higher authority to initiate action. Such cases are the responsibility of the Commanding Officers to resolve and they will be expected to take necessary corrective action without delay. Examples of such cases include but are not limited to:

"a. Lateness.

"b. Uniform and equipment violations.

"c. Personal appearance infractions.

"d. Minor omissions in assigned duties.

"e. Minor infractions of Departmental regulations concerned with efficiency or safety.

"*Sec. 17-35.3. Same — The Deputy Chief of Police.*

"1. Make an independent investigation of a complaint; or

"2. Make a preliminary investigation and assign selected personnel to develop full facts under the Deputy Chief's supervision.

"3. Be responsible for the supervisory and expeditious completion of investigations alleging misconduct.

"4. Conduct an investigation at the request of any member of the Department who justifiably feels threatened by a false accusation or a contrived situation involving false evidence. Such members are authorized to report their situations directly to the Deputy Chief, Chief of Police and/or the Director of Public Safety without reporting to their superiors.

"5. Upon completion of sustained investigations by the Deputy Chief of Police:

(a) Mark investigation "unfounded" or "insufficient for charges".

(b) Mark investigation for disciplinary processing.

"*Sec. 17-35.4. Same — The Chief of Police.*

(A) The Chief of Police shall review and pass upon recommendations of Deputy Chief of Police as set forth in Section 17-35.3, Subparagraph 5. When the Chief of Police has passed upon the recommendations of the Deputy Chief of Police and determined that there is sufficient merit to a complaint to start a disciplinary hearing, he shall give the accused notice as set forth in Section 17-37.1 of this Article.

(B) The Chief of Police shall perform duties assigned to him for the organization of a Police Hearing Board as set forth in Section 17-37.2 of this Article.

(C) The Chief of Police shall exercise the powers as shown in Section 17-38 of this Article.

"*Sec. 17-36. Officers Rights.*

"To insure that such investigations are conducted in a manner conducive to good order and discipline, meanwhile observing and protecting the individual rights of each member of the force, the following rules of procedure hereby are established:

"1. The interrogation of any Department member shall be at a reasonable hour, preferably when the member is on duty, and during the daylight hours unless the exigencies of the investigation dictate otherwise. In the latter event, reassignment of the member's tour of duty shall be employed.

"2. The interrogation shall take place at a location designated by the investigating officer, usually at Police Headquarters.

"3. The subject of an inquiry shall be informed of the rank, name and command of the interrogating officer and the identity of all persons present during an interrogation. If a member of the Department is directed to leave his beat and report for interrogation to headquarters, his commanding officer shall be promptly notified of his whereabouts.

"4. The officer under investigation shall be informed of the nature of the investigation before any interrogation commences. Sufficient information to reasonably apprise the member of the allegations should be provided. If it is known that the member of the Department being interrogated is a witness only, he should be so informed.

"5. The interrogation shall be completed with reasonable dispatch. Reasonable respites shall be allowed. Time shall be provided also for personal necessities, meals, telephone calls, and rest periods as reasonably necessary.

"6. The member shall not be subjected to any offensive language, nor shall be threatened with transfer, dismissal, or other disciplinary punishment. No promise of reward shall be made as an inducement to answering questions. Nothing herein is to be construed as to prohibit the investigating officer from infor-

ming the member that his conduct can become the subject of disciplinary action resulting in disciplinary punishment. *Officers must cooperate fully with the investigation officer unless they are the accused.* Failure to fully assist in the investigation will make the officer subject of disciplinary action.

"7. In all cases wherein a member is to be interrogated concerning an alleged violation of the Department Rules and Regulations which, if proven, may result in his dismissal from the service or the infliction of other disciplinary punishment upon him, he shall be afforded, if he so requests, a reasonable opportunity and facilities and at least 24 hours to contact and consult privately with an attorney of his own choosing. An attorney of his own choosing may be present during the interrogation but may not participate in the investigation except to counsel the member. However, in such cases, the interrogation may not be postponed for purpose of counsel past 10:00 a.m. of the day following notification of interrogation.

"8. The complete interrogation of the officer shall be recorded mechanically or by a stenographer. There will be no "off the record" questions. All recesses called during the questioning shall be noted in the record.

"9. If an officer is under arrest or is likely to be, that is, if he is a suspect or the target of a criminal investigation, he shall be given his rights pursuant to the Miranda decision.

"10. Under the circumstances described in paragraph 7, the member shall be given an exact copy of any written statement he may execute, or if the questioning is mechanically or stenographically recorded, the member shall be given a copy of such recording or transcript if requested by him.

"11. The refusal by an officer to answer pertinent questions concerning any non-criminal matter may result in disciplinary action.

"12. Members may be requested to submit to polygraph, intoximeter, or other standard investigative examination employed. Such tests must be given if requested by the member.

"*Sec. 17-37. Disciplinary Procedure.*

"*Sec. 17-37.1. Preliminary Notification.*

"When the Deputy Chief of Police determines that there is sufficient merit to a complaint to start a disciplinary hearing he shall:

"1. Advise the accused in writing of the charges to be brought against the officer, charges may be personnally served or served by registered mail.

"2. The accused will be advised that he has a right to counsel and may call witnesses in his behalf.

"3. He shall also be afforded a hearing date within thirty (30) calendar days of the notice in the absence of unusual circumstances.

"*Sec. 17-37.2. Police Hearing Board.*

"Prior to the hearing date the accused will be advised that the charges will be heard by a police hearing board comprised of the Director of Public Safety and two civilian board members appointed by the Council of Columbus, Georgia as permanent members who may not be removed under Subsection 3 hereof and four officers of the Columbus Police Department selected by the Chief of Police.

"1. The officers must each be of equal or higher rank than the accused.

"2. The officers cannot be from the division in which the accused serves.

"3. The accused may ask that any one officer on the Board be removed without cause and Chief will provide another member.

"4. One of the civilian board members shall be appointed to serve a term ending January 1, 1972, and until his successor is named and appointed and one of the civilian board members shall serve a term ending January 1, 1973, and until his successor is named and appointed. All appointees to such board made after the initial appointments shall be for unexpired terms or for terms of two years. Civilian board appointees shall not be eligible to succeed themselves.

"5. At least five (5) members shall be present and a vote of four (4) shall be necessary for any action.

"*Sec. 17-37.3. The Hearing.*

"1. Hearings will be conducted in rooms sufficiently large to accomodate the members of the Board, the accused's attorneys, members of the news media, and representative interested parties, and such hearing shall be public.

"2. The police hearing board shall not be bound by the rules of evidence but may consider any evidence which it deems relevant or material to the subject of inquiry.

"*Sec. 17-37.4. Same — Procedure.*

"The hearing shall consist of:

"(A) *Opening statement of charges and contentions of the Police Department.* The officer accused shall have the right to present an opening statement at the time or before presenting evidence in his defense.

"(B) Presentation of Police Department evidence.

"(C) Presentation of evidence for officer accused. (Opening statement of officer may be presented prior to presentation of evidence if opening statement has not been previously made).

"(D) Presentation of evidence of Police Department strictly confined to rebuttal of officers evidence.

"(E) Closing statement. *In all cases the Police Department may present a closing statement* or may waive it and in all cases the officer accused shall have the right to present the final closing statement or may waive it.

"*Sec. 17-37.5. Same — Witnesses.*

"1. Witnesses may be called by the Police Department or the officer charged.

"2. Witness will be excluded from hearing room until needed.

"3. Either the Police Department or the officer charged shall have the right to have any witness present throughout the hearing upon showing that such witness is necessary to present the case of the Police Department or the officer charged."

SECTION 2.

The Police Hearing Board created by Section 17-37.2 of the Code of Ordinances, as amended by Section 1 of this Ordinance shall be considered a successor Board to the Board of Public Safety as it heretofore existed prior to the effective date of consolidation. Any and all cases pending before the Board of Public Safety in which appeals had been filed which were not heard prior to January 1, 1971, may be continued, heard and disposed of by the Police Hearing Board as the successor Board to the Board of Public Safety.

Introduced and read at a regular meeting of the Council of Columbus, Georgia, held on the 12th day of January, 1971; read a second time at a regular meeting of said Council held on the 19th day of January, 1971, and adopted at said meeting by the affirmative vote of nine (9) members of said Council.

Councilman Batastini voting Yes.

Councilman Binns voting Yes.

Councilman Forte voting Yes.

Councilman Illges voting Absent.

Councilman Land voting Yes.

Councilman McClung voting Yes.

Councilman McDaniel voting Yes.

Councilman Rigdon voting Yes.

Councilman Turgeon voting Yes.

Councilman Wright voting Yes.

/s/ LEMUEL H. MILLER, JR.
CLERK

/s/ J. R. ALLEN
MAYOR

Submitted to the Mayor for signature,
this the 21 day of Jan. 1971
Sec: 3-202(1)
/s/ LHM
Clerk of Council

This ordinance received, signed by the Mayor, at 9:43 o'clock A.M. on the 21st day of Jan. 1971, and became law at said time received.

Sec: 3-202(2)
/s/ LEMUEL H. MILLER, JR.
Clerk of Council

AN ORDINANCE
No. 71-154

An Ordinance defining responsibility of the Chief of Police regarding suspensions and dismissals prior to a hearing before a Police Hearing Board.

THE COUNCIL OF COLUMBUS, GEORGIA, HEREBY ORDAINS:

SECTION 1.

That the Code of Ordinances of Columbus, Georgia, be and the same is hereby amended by adding thereto a new Section numbered 17-38, defining the authority of the Chief of Police regarding suspensions and dismissals prior to a hearing before a Police Hearing Board, which said Section shall read as follows:

"*Sec. 17-38. Suspensions and Dismissals.*

"The Chief of Police can dismiss any officer prior to a hearing by the Police Hearing Board for:

1. Insubordination
2. Use of alcoholic beverages or drugs which are illegal while on duty

3. Gross immorality
4. Bribery
5. Conversion or gross mishandling of evidence
6. Dangerous misuse of firearms
7. Evidence of the officer's commission of a felony
8. Conduct unbecoming an officer

The Chief and officers of the rank of Sergeant and above can suspend an officer for violation of rules and regulations or conduct unbecoming an officer upon good information of such misconduct for no more than twenty-four hours without approval of the Chief, Deputy Chief, or a Major.

A. Officers will not be suspended for more than thirty (30) days unless they have been served with a warrant or are subjects of indictments."

Introduced and read at a regular meeting of the Council of Columbus, Georgia, held on the 1st day of June, 1971; read a second time at a regular meeting of said Council held on the 10th day of June, 1971, and adopted at said meeting by the affirmative vote of 10 members of said Council.

Councilman Batastini voting YES.

Councilman Binns voting YES.

Councilman Forte voting YES.

Councilman Illges voting YES.

Councilman Land voting YES.

Councilman McClung voting YES.

Councilman McDaniel voting YES.

Councilman Rigdon voting YES.

Councilman Turgeon voting YES.

Councilman Wright voting YES.

/s/ LEMUEL H. MILLER, JR.
CLERK

/s/ J. R. ALLEN
MAYOR

Submitted to the Mayor for signature,
this the day of JUN 10, 1971
Sec: 3-202(1)
/s/ LEMUEL H. MILLER, JR.
Clerk of Council

This ordinance received, signed by the
Mayor at 11:35 o'clock A.M. on the
day of JUN 11, 1971, and became
law at said time received.
Sec: 3-202(2)
/s/ LEMUEL H. MILLER, JR.
Clerk of Council

APPENDIX L

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8158

ROBERT LEONARD, et al.,
Plaintiffs-Appellants,

versus

THE CITY OF COLUMBUS, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF GEORGIA,
COLUMBUS DIVISION

PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

Eugene Hardwick Polleys, Jr.
City Attorney
P.O. Box 1340
Columbus, Georgia 31993

Attorney for Defendants-Appellees.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

To the Honorable Judges of the United States Court of Appeals for the Eleventh Circuit:

City of Columbus, et al., Defendants-Appellees, present their Petition for Rehearing and Suggestion for Rehearing En Banc, and in support thereof respectfully show the following:

CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the following persons have an interest in this appeal:

The plaintiffs-appellants: Robert Leonard; Willie L. Pearson, Jr., Vinson Willis; John H. Clark, Jr.; Gary L. Smith; and Freddie L. White.

Counsel for plaintiffs-appellants; Joel M. Gora and Margie Pitts Hames; and Neil Bradley and E. Richard Larson of the American Civil Liberties Union Foundation.

The defendants-appellees: J. R. Allen (deceased); A. J. McClung; Joseph W. Sargis; Leonard Leavell; Hugh Bentley; B. F. McGuffey; and S.W. Brown.

Counsel for defendants-appellees: Eugene Hardwick Polleys, Jr. (no financial interest).

/s/ Eugene Hardwick Polleys, Jr.
COUNSEL FOR DEFENDANTS-APPELLEES

STATEMENT OF CITY ATTORNEY AS TO WHY EN BANC CONSIDERATION HAS BEEN SUGGESTED AND IS NECESSARY

(a) I express a belief based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

(1) Kelley v. Johnson, 425 U.S. 238 (1976)
(2) United States v. O.Brien, 391 U.S. 367 (1968)
Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (4) (11th Circuit 1982)
(3) Arnett v. Kennedy, 416 U.S. 134 (1974)
Glenn v. Newman, 614 F.2d 467 (6) (5th Circuit 1980)
Wilson v. Taylor, 658 F.2d 1021 (12) (5th Circuit, Unit B, 1981)
(4) Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949)
(5) Spence v. Washington, 418 U.S. 405 (1974)
(6) Brown v. Glines, 444 U.S. 348 (1980)
(7) Greer v. Spock, 424 U.S. 828 (1976)
(8) Parker v. Levy, 417 U.S. 733 (1974)
(9) U.S. Postal Service v. Greenburgh Civic Association, ____ U.S. ____ (June 25, 1981)
(10) Heffron v. International Society for Krishna Consciousness, Inc., ____ U.S.____ (June 22, 1981)
(11) Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)
(12) Adderley v. Florida, 385 U.S. 39 (1966)
(13) Kovacs v. Cooper, 336 U.S. 77 (1949)
(14) Cox v. Louisiana, 379 U.S. 536 (1965)
(15) Brown v. Louisiana, 383 U.S. 131 (1966)

(16) Pickering v. Board of Education, 391 U.S. 563 (1968)
Abbott v. Thetford, 534 F.2d 1101 (5th Circuit 1976)
Smalley v. Eatonville, 640 F.2d 765 (5th Circuit, Unit B, 1981) Waters v. Chaffin, 684 F.2d 833, 838, 839, 840 (11th Circuit 1982)

(17) Tinker v. DesMoines School District, 393 U.S. 503 (1969)
Burnside v. Byars, 363 F.2d 744 (3-5) (5th Circuit 1966)
Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Circuit 1966)

(18) Howat v. Kansas, 258 U.S. 181 (1922)
Locke v. United States, 75 F.2d 157 (5th Circuit 1935)
McLeod v. Majors, 102 F.2d 128 (5th Circuit 1939)

(19) Cox v. New Hampshire, 312 U.S. 569 (1941)

(20) Walker v. City of Birmingham, 388 U.S. 307 (1967)

(21) Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)

(22) Nixon v. Fitzgerald, ____ U.S. ____ (June 24, 1982)

(23) Harlow v. Fitzgerald,____ U.S. ____ June 24, 1982)
Barker v. Norman, 651 F.2d 1107 (3-9) (5th Circuit 1981)

(24) Connick v. Myers,____ U.S. ____ (April 20, 1983)

(25) Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978)

/s/ Eugene Hardwick Polleys, Jr.
ATTORNEY OF RECORD FOR
DEFENDANTS-APPELLEES

(b) I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

(1) Does the deliberate and public removal of American flag emblems by police officers from their uniforms which are issued and owned by the City of Columbus constitute an act of symbolic speech protected by the First Amendment? No.

(2) Can an act of plain desecration of public property in plain defiance of a proper legislative enactment which has been implemented by authorized executive officials receive the sanction of federal judicial authority 12 years after the fact with the further sanction of damages or reinstatement or both to be assessed on behalf of the perpetrators and against both the corporate and individual governmental entities? No.

(3) Is the wilful disobediance of subordinate policemen who contemptuously inform their superiors - - in a public spectacle staged for the benefit of news media in front of Police Headquarters - - that they have no present or future intention of complying with city or departmental regulations to be tolerated under a label of "free speech" when there have been no inhibitions on the subordinates in *directly and objectively* communicating their very thoughts which they claim to be attempting to communicate by their *indirect and subjective* "symbolic disobedience"? No.

(4) Should the federal judiciary authorize *lawless* conduct by members of a quasi-military municipal police force who intentionally seek to disrupt the command relationship in which a municipality has such a compelling interest even though the same federal judiciary affords the

same policemen ample *lawful* means to remedy their alleged grievances - - grievances which they *abandon* in the very same lawsuit which they, prior to trial, narrow to a single issue of wrongful discharge? No.

(5) Will all principles relating to curative post-termination proceedings be cast aside even though the plaintiffs, through counsel, invoked and received hearings which confirmed their initial dismissals and which produced not a single allegation of procedural due process inadequacy in their complaint? No.

(6) Will the federal appellate tribunal remain completely oblivious to the defendants' properly pleaded defenses of executive and legislative and judicial official immunity and good faith (as well as the point as to whether the *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978) rule of municipal liability applies retroactively to a 1971 claim or whether the complaint contains sufficient allegations to invoke liability under *Monell*) without even the faintest hint as to whether the Court of Appeals considered such matters on appeal or whether the District Court could consider such matters on remand? No.

(7) Will the Court of Appeals try this case de novo and apply the 1977 burden-shifting standard of *Mt. Healthy City School District* to the City of Columbus trial of 1975 despite the explicit contrary command of *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)? No.

/s/ Eugene Hardwick Polleys, Jr.
ATTORNEY OF RECORD FOR
DEFENDANTS-APPELLEES

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STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

1. The issues which merit en banc consideration have been stated by the questions posed at the outset by counsel for Defendants-Appellees.

2. The panel decision without any citation of authority concluded that the plaintiffs-appellants had been discharged without authority of local or state law and thereby dispensed with the several authorities cited by defendants-appellees to suggest conformity with these standards - - which are consistent with federal standards: the rationale for the dismissal in light of state and local law is set out in the brief on appeal and will not be repeated here; however, it would constitute a proper ground for rehearing en banc because of the sanction for these standards in binding federal authority: *Ex-parte Hennen*, 13 Peters 230 (1839); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *EEOC v. Airguide Corp.*, 539 F.2d 1038 (5th Circuit 1976).

3. Ramifications of the panel decision can be stated by asking such hypothetical questions as the following:

(a) Can a dissident group lower the city-owned national, state, or local colors maintained by the Muscogee County Sheriff which fly on the three flagpoles in front of the

Government Center in Columbus, Georgia and prohibit the raising of any or all of the three until such time as their discontent is assuaged? Would the First Amendment sanction graffitti on the walls of the National Capitol on the promise to erase or whitewash the protected message at such time in the future as the government and its officials comply with the authors' notions of constitutional law? The authorities binding on the Court of Appeals say "No!"; the panel says "Yes!"

(b) Can an officer or enlisted man in the United States Army appear in public or before the Commanding General of Fort Benning, Georgia and remove such offensive national symbols as stars and eagles from their uniforms until such time as the Army or the federal government ceases such policies as the training of Salvadoran military personnel which such protesting American personnel might find objectionable? Would the First Amendment extend such a right to the Joint Chiefs of Staff in an appearance at the White House? The authorities binding on the Court of Appeals say "No!"; the panel says "Yes!"

(c) Can the corporate entity and the individual officials of Columbus, Georgia suffer damages or be forced to operate a Police Department (or both) with its membership made up in part of those who purposely defy a uniform regulation which is no less authorized and not materially or constitutionally different than a 1968 law of Congress (18 U.S.C. §700) which imposes criminal sanctions on those who desecrate the American flag - - a term which the statute itself defines to include "any picture or representation of" the national colors or any part of those colors? Would the First Amendment extend such a right to the security guards of the Supreme Court of the United States? The authorities binding on the Court of Appeals say "No!"; the panel says "Yes!"

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This case was previously before the Fifth Circuit on jurisdictional and abstention grounds *Leonard v. City of Columbus*, 551 F.2d 974 (5th Circuit 1977), *aff'd en banc*, 565 F.2d 957 (5th Circuit 1977), *cert. denied*, 433 U.S. 905 (1979) (with written opinion by three dissenters), *reh. denied*, 444 U.S. 887 (1979). It is now before the Eleventh Circuit on the merits after the United States District Court for the Middle District of Georgia, Columbus Division, entered a judgment for Defendants on February 23, 1982. It remains before the Eleventh Circuit with a suggestion for en banc consideration after the reversal of the District Court by a three-judge panel on May 23, 1983.

STATEMENT OF ANY FACTS NECESSARY TO ARGUMENT OF THE ISSUES

The opinion of the panel does not disagree with the factual findings of the District Court even though the panel places a rosy constitutional glow on the states of mind of the dismissed police officers while at the same time it apparently views the City and its officials with at least some degree of suspicion that may have amounted to an unstated de novo finding of bad faith. Footnote 2 of the panel decision makes it clear that the panel recognized that the City issued uniforms to the officers with flag patches already sewn onto the sleeves. The Police Chief testified repeatedly to opposing counsel (T-313,314) that after the City passed the flag insignia resolution in 1969, the City issued uniforms to comply - - a point which illustrates not only did the plaintiffs know of the requirement but that the plaintiffs also were tampering with *public property* when they removed the emblems. A reading of the District Court opinion reveals

certain facts which do not surface in the panel opinion but which ought to be weighed by the full bench of the Court of Appeals in determining whether or not a monumental constitutional aberration now exists on the books of this circuit which ought to be corrected:

(1) Plaintiffs violated their oaths of office in desecrating their uniforms;

(2) Plaintiffs propounded the incredible theory that they did not know of the emblem requirement - - a position which detracts from the credibility of their entire position that their conduct is embellished with and protected by the noble provisions of the First Amendment;

(3) Plaintiffs were not dismissed for nor hindered in any manner from their numerous "pure speech" activities but were dismissed on May 31, 1971 for their "pure act" of insubordination which was unassociated with any other legitimate form of communication;

(4) Plaintiffs received post-termination hearing before the Police Hearing Board at times agreeable to their attorney;

(5) The seven individual defendants' various positions with the government are enumerated with some precision and with every factual indication that each was without fault - - a stark contrast to nebulous findings by the panel that the Mayor, Safety Director, and Police Chief "usurped" the function of the Police Hearing Board (how they are not told) and in stark contrast to the "non-findings" of what it is that the four others supposedly did to subject themselves to liability, not to speak of the problem of how corporate liability is to be assessed when "usurpers" supposedly cast aside the Board created by the corporation which is itself the very Board on which two of the seven defendants had the misfortune of sitting; not to speak also of the difficulty the Deputy Police Chief and the Mayor Pro-Tem (a member of the Columbus Council) must have in reading the panel opinion and perceiving why they should be assessed for damages.

ARGUMENT AND AUTHORITIES

The panel decision is bizarre in its conclusions and bewildering in its rationale. Following the enumerations and citations of cases set out at the beginning of this petition as being contrary to the panel, the City and its officials undertake to show why:

1. *Kelley v. Johnson*, 425 U.S. 238 (1976): A decision overlooked by the panel, it validated grooming standards for police officers, spoke of the right of the government to regulate First and Fourteenth Amendment rights of its employees more closely than the general public, approved the wearing of a standard uniform with specific details and the requirement to salute the flag without the necessity of placing a burden on the state to prove a public need but rather giving such organization and dress requirements the presumption of legislative validity and conversely placing on the complaining policemen the burden of proving no rational connection between the regulation and the promotion of public safety, and allowed dismissal in the first instance of a complaint because of the obvious desirability of uniform requirements for promoting the legitimate goals of similarity of appearance and esprit de corps.

2. *United States v. O'Brien*, 391 U.S. 367 (1968); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (4) (11th Circuit 1982): Placed in a position of prime importance by the City to show the difference between impermissible symbolic speech or conduct and permissible speech, neither its classic statement of this distinction nor its four-point test of validity for government regulations in the face of free speech claims (391 U.S. 367, 376, 377) ever saw the light of day in the panel decision, an oversight made even more inexplicable by the fact of the application of *O'Brien* by the newborn Eleventh Circuit in *Grand Faloon Tavern*.

3. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Glenn v. Newman*, 614 F.2d 467 (6) (5th Circuit 1980); *Wilson v.*

Taylor, 658 F.2d 1021 (12) (5th Circuit, Unit B, 1981): Also placed in a position of prime importance by the City not only because of its citation of earlier authority to the effect that common sense as well as common law would suggest to government employees that they cannot under the First Amendment keep their jobs while inveighing against their superiors in public but also because of its position as the leading authority for the proposition that post-termination hearings conform to due process requirements, *Arnett* also was never mentioned by the panel nor were the applications of *Arnett* by this circuit in *Glenn* as to the curative effects of a post-termination hearing nor the disallowance of backpay in *Wilson* between a procedurally improper discharge and a procedurally proper hearing considered worthy of notice - - despite the fact that the plaintiffs' complaint never even contested the procedural adequacy of the very Police Hearing Board that provided the hearing which plaintiffs themselves had deliberately invoked.

4. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490 (1949): Although it ranks as a leading case for the proposition that illegal conduct cannot be immunized by the presence of speech elements and although it was written by a leading proponent of First Amendment freedoms (Hugo Black), the panel ignored it.

5. *Spence v. Washington*, 418 U.S. 405 (1974): Cited by the panel for the proposition that the American flag represents "precepts fundamental to this nation" and "has been the focal point of suits involving freedom of expression," the panel forgot this cogent observation at page 409: "We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property." 6, 7, & 8. *Brown v. Glines*, 444 U.S. 348 (1980); *Greer v. Spock*, 424 U.S. 828 (1976); *Parker v. Levy*, 417 U.S. 733 (1974): Although a cryptic paragraph of the panel opinion refers to the clear and proper observation of the District Court of the need

for "discipline" in a "paramilitary" or "quasi-military" organization such as the Columbus Police Department, the panel never even remotely alludes to this line of decisions which established the need for response to command and respect for duty requiring more restrictive application of the First Amendment in the military community for both *civilians* and *military* personnel.

9. *U.S. Postal Service v. Greenburgh Civic Association*, ____U.S. ____(June 25, 1981): Slip opinion at page 17 did not allow the use of mailboxes at private homes for the delivery of non-postal information, a policy consistent with the refusal of the Columbus Police Department to allow the use of its uniforms for the conveyance of whatever information the plaintiffs were attempting to convey: "But it is a giant leap from the traditional 'soap box' to the letter box designated as an authorized depository of the United States mails, and we do not believe the First Amendment requires us to make that leap."

10. *Heffron v. International Society for Krishna Consciousness, Inc.*, ____ U.S. ____ (June 22, 1981): Slip opinion on pages 6, 7 (quoting prior authority) approves reasonable time, place, and manner restrictions of First Amendment activities: " 'We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of information.' "

11. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974): In upholding the restriction of advertising on municipal transit systems, this decision makes it clear that all public property need not be exposed to First Amendment communications: "Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would

become Hyde Parks open to every would-be pamphleteer and politician." 418 U.S. at 304.

12. *Adderley v. Florida*, 385 U.S. 39 (1966): As in the present case, the complainants were not punished for their views or objectives but for demonstrating on the premises of the county jail: "The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." P.

13. *Kovacs v. Cooper*, 336 U.S. 77 (1949): A municipal ordinance prohibiting mechanical voice amplification on the streets is upheld in spite of the right of a speaker to reach the minds of willing listeners: "It is an extravagant extension of due process to say that because of it a city cannot forbid talking on the streets through a loud speaker in a loud and raucous tone." 336 U.S. at 87.

14. *Cox v. Louisiana*, 379 U.S. 536 (1965): The decision reaffirms *Giboney's* caveat to First Amendment rights and states the permissibility of more restrictive regulation of communicative activity which goes beyond pure speech: "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." at p. 555

15. *Brown v. Louisiana*, 383 U.S. 131 (1966): The First Amendment would allow *silent* protest but not *noisy* protest in the reading room of a library whose proper regulations must be obeyed: "Here, there was no disturbance of others, no disruption of library activities, and no violation of any library regulations." 383 U.S. at 142

16. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Abbott v. Thetford*, 534 F.2d 1101 (5th Circuit 1976); *Smalley v. Eatonville*, 640 F.2d 765 (5th Circuit, Unit B, 1981); *Waters v. Chaffin*, 684 F.2d 833, 838, 839,

840 (11th Circuit 1982): In citing the *Pickering* balancing test, the panel not only fails to recognize the greater latitude which the Constitution allows teachers in the academic community but it also fails to recognize that the message conveyed presented no questions concerning faculty discipline and harmony; the dismissals upheld in *Abbot* and *Smalley* produced the same disruption to discipline and working relationships which were produced by the removal of the flag emblems on May 31, 1971, and the discipline administered in *Waters* would have been upheld had it amounted to the type of conduct which occurred in front of Police Headquarters on that date.

17. *Tinker v. DesMoines School District*, 393 U.S. 503 (1969; *Burnside v. Byars*, 363 F.2d 744 (3-5) (5th Circuit 1966); *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Circuit 1966): The panel opinion cites *Tinker* in two separate paragraphs: one states that the Columbus policemen went beyond the "pure speech" described in the *Tinker* student armband protest, while another states that the Columbus policemen's protest was closely "akin to pure speech" - - also a parallel to the language of *Tinker*; irrespective of how far beyond or how closely akin to "pure speech" the panel classified the Columbus policemen's conduct, the panel nevertheless failed to observe the caveat of *Tinker* and the two Fifth Circuit cases which it cited (*Burnside* and *Blackwell*, discussed at 393 U.S. 505) - - all of which concluded that even students, to whom greater First Amendment latitude may be given than policemen, cannot engage in symbolic speech by "actually or potentially disruptive conduct (393 U.S. at 505): which is what occurred on May 31, 1971 - - a reality of departmental and command relationships which cannot be eliminated by the bland observation that the Columbus officers "peacefully removed the American flag from their uniforms." 18, 19, & 20. *Howat v. Kansas*, 258 U.S. 181 (1922); *Locke v. United States*, 75 F.2d 157 (5th Circuit 1935); *McLeod v. Majors*,

102 F.2d 128 (5th Circuit 1939); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Walker v. City of Birmingham*, 388 U. S. 307 (1967): This line of decisions, culminating in *Walker*, expresses the established tradition that challenges to laws must be made in an orderly fashion and that the courts will not license lawless activity such as the 1971 flag incident. Not only does *Cox* contain the classic statement that civil liberties "imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses" (312 U.S. 569, 574), but it, along with the other cases, refutes the panel's suggestion in Footnote 6 (which the publisher picks up in Syllabus 3) that the uniform requirement may be unconstitutional and that the officers had no obligation to comply with it. If this case had presented the segregated water fountains hypothetical posed in Footnote 6, the reader of the opinion might well wonder if the panel would have allowed the plaintiffs to forcefully rip the offensive plumbing fixture from the walls of Police Headquarters rather than file for declaratory or injunctive relief under the Civil Rights Act. This point in our argument is an appropriate time to emphasize that the plaintiffs abandoned all of those numerous allegations to their complaint attributing discrimination to the Columbus Police Department; it would certainly have been more consistent with *Walker* and its antecedents had the plaintiffs gone to trial on the *merits* of their discrimination claims rather than use them as an excuse for disobeying municipal and departmental rules.

21. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979): "Since this case was tried before *Mt. Healthy* was decided, it is not surprising that respondents did not attempt to prove in the District Court that the decision not to rehire petitioner would have been made even absent consideration of her 'demands.' " (439 U.S. at 417) Not only was the case at bar tried two years before *Mt. Healthy*, but also the City and its officials had no inkling

that the threshold requirement of *Mt. Healthy* would be surpassed: the panel not only has applied a burden-shifting rule to the defendants ex post facto, it has also tried the case on appeal de novo without even rudimentary findings of fact to disentangle the roles of the summary dismissal on May 31, 1971 for the flag incident and the ratification of the dismissals by the Police Hearing Board in July 1971 for the flag incident and other charges; nor is it clear what the City should have proved about the Police Hearing Board which the complaint did not challenge in the first instance.

22. *Nixon v. Fitzgerald*, ____ U.S. ____ (June 24, 1982): This decision provides considerable historical discussion of the immunity of government officials from civil damages.

23. *Harlow v. Fitzgerald*, ____ U.S. ____ (June 24, 1982); *Barker v. Norman*, 651 F.2d 1107 (3-9) (5th Circuit 1981): These cases discuss qualified official immunity and good faith defenses and how such matters shall be tried; the panel decision does not take up these subjects.

24. *Connick v. Myers*, ____ U.S. ____ (April 20, 1983): This decision, cited twice in the panel opinion, should have produced a different decision by the panel:

> "Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment." Slip opinion, page 15.

The City reiterates that those matters of public concern

which the panel seized upon to justify the plaintiffs' violation of City rules were the same matters which plaintiffs dropped from their rather extensive lawsuit - - undoubtedly because their claims never had any merit in the first place.

25. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978): How does a municipal corporation immune from civil rights liability in 1971 become liable in 1983 for a cause of action arising in 1971 on the basis of a decision decided in 1978? What findings or conclusions in the panel decision suggest that either the complaint or the events of 1971 meet the *Monell* criteria? The City doesn't know the answer to either one of these questions, but they indicate the confusion created by the blanket reversal of the District Court's dismissal against all defendants. The criteria expressed in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) suggest that *Monell* should not be applied retroactively - - even though at least two other non-binding decisions have reached contrary conclusions: *Kurtz v. Waukesha*, 280 N.W. 2d 757 (Wisconsin Supreme Court 1979); *Morgan v. Sharon Pennsylvania Board of Education*, 472 F.Supp. 1157 (W.D. Pa. 1979).

CONCLUSION

The Babylonians have their creation story (*Enuma elish*), as do the Greeks (Hesiod's *Theogeny*), and the Hebrews (*Genesis*), the last of which is a familiar and incomparable work of literary and theological genius. In the three stories, either Marduk or Zeus or Jehovah creates world order out of primeval chaos. These three civilizations, which contemplated their divinely ordained beginnings out of chaos, also contemplated how they could govern themselves in orderly societies of men; so our heritage includes the Code of Hammurabi, the *Republic* of Plato, the Ten Commandments, and the Sermon on the Mount. In the few millennia of the written recording of the Western Civilization, we find a continuing

effort to balance authority and liberty: the partricians and plebeians of Rome compromised with the Twelve Tables of Roman Law, and the English King and barons compromised with *Magna Carta.* Columbus, Georgia in the Summer of 1971 was a microcosm of the long human struggle to rise out of chaos and to maintain a freedom which only exists when a people discipline themselves to respect authority which also disciplines itself to respect the people who are in fact the ultimate source of authority. The Columbus officials and the trial judge who passed on their case struck a favorable balance for disciplined freedom, and they restored order out of chaos; the panel decision, however, which is an unwarranted exercise of authoritarianism neither justified by any of the intellectual traditions or the common sense experiences of that American jurisprudence which is the brilliant offspring of the Western Civilization, would create chaos out of order. Accordingly, the full bench of the Court of Appeals should set aside the panel decision and affirm the District Court.

Respectfully submitted this the 10th day of June, 1983.

/s/ Eugene Hardwick Polleys, Jr.,
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ATTORNEY FOR DEFENDANTS-APPELLEES

CERTIFICATE OF SERVICE

The undersigned, counsel for Defendants-Appellees and a member of the bar of this court, hereby certifies that two copies of this Petition for Rehearing and Suggestion for

Rehearing En Banc for Defendants-Appellees were served this the 10th day of June by mailing same by first class United States mail, with postage prepaid, to each counsel for Plaintiffs-Appellants:

NEIL BRADLEY
American Civil Liberties Union Foundation
52 Fairlie Street, N.W.
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All parties required to be served have been served this 10th day of June, 1983.

/s/ Eugene Hardwick Pollyes, Jr.
COUNSEL FOR DEFENDANTS-APPELLEES

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NO. 83-861

IN THE

Supreme Court of the United States

October Term, 1983

THE CITY OF COLUMBUS, a consolidated municipal government; J.R. ALLEN, Mayor (deceased); A.J. McCLUNG, Mayor Pro Tem; JOSEPH W. SARGIS, Director of Public Safety; LEONARD LEAVELL and HUGH BENTLEY, Members Police Hearing Board; B.F. McGUFFEY, Chief of Police; and S.W. BROWN, Assistant Chief of Police,

Petitioners,

versus

ROBERT LEONARD; WILLIE L. PEARSON, JR.; VINSON WILLIS; JOHN H. CLARK, JR.; GARY L. SMITH; and FREDDIE L. WHITE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MARGIE PITTS HAMES
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STATEMENT OF THE CASE

This case concerns the dismissal of six black police officers from the Columbus, Georgia, police department in May, 1971. The court of appeals ruled that the dismissals violated the respondents' first amendment rights and remanded the matter for determination of an appropriate remedy. The relevant facts, few of which are set forth in the petition for writ of certiorari, are as follows.[1]

---

1. Instead of referring to the facts in this record, the petitioners rely on matters in an opinion in a different case to try to paint a negative picture of respondents. They do so with neither accuracy nor fairness.

The case referred to, Community Action Group (CAG) v. City of Columbus, Civ. No. 1528 (M.D. Ga. 1971), 473 F.2d 966 (5th Cir. 1973), expressly did not determine any issues concerning the dismissals of these respondents. A-84, n.2. The CAG case focused on events that occurred weeks and months after the dismissals, and dealt with municipal efforts to control large scale demonstrations.

FOOTNOTE CONT'D NEXT PAGE...

1. Events leading to the Removal of the American Flag Emblems

In early 1971, respondents and other black police officers in the Columbus Police Department began to express their concern about what they believed to be racial discrimination within the depart-

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FOOTNOTE CONT'D

It is true that four respondents were among many plaintiffs in the CAG case. The petitioners choose to quote the court of appeals opinion in CAG that there was evidence that "some of the plaintiffs were involved in the arson fires..." Petition, 4. The district court opinion in CAG case, at A-92 to A-94, specifies what individuals were evidentially connected to arson. None is before this Court. Petitioners also refer to the arrests of two respondents--which took place 54 days after they were fired, A-107, A-109--by reference to the district court opinion in the CAG case, Petition, 4, before commenting that "none of the present six [respondents] can be said to have committed specific crimes..." Ibid. Although even this "concession" was not included in the petitioners' court of appeals brief where they attempted the same diversion, the implication that respondents are vaguely guilty of unspecified crimes is as objectionable as it is unfounded.

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ment, manifested by unequal treatment of black officers in assignments, promotions, and disciplinary practices, and by police brutality against members of the black community. T. 8-9, 34-41, 44-45, 74-76, 78, 110, 130-31, 184-85, 205, 215.* These officers formed an organization known as the Afro-American Patrolmen's League [hereinafter the "League"] T. 12-13, 134, 226. The officers, via the League, presented their grievances to black community leaders and to police officials, but when no response was forthcoming, they decided to take the issues to the public. T. 9-12, 109-10, 131-33, 384.

On March 26, 1971, the League,

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*Citations herein will be as follows: petition appendix - A - __; pleadings - R.__; transcript - T.__; exhibits - Ex.__.

through its spokesman Officer Leonard, a respondent here, issued a press release generally critical of police relations in the black community and calling for an investigation of several specific episodes. T. 70-78; Ex. D-13, T. 70-71. Officer Leonard detailed these charges at a press conference, where he voiced general complaints about the department but did not direct any specific criticism at any particular department official and made no reference to the identify of the officers involved in the various incidents. Ex. P-14, T. 438, 440.

During the same period, the League officers drew up a petition of grievances, describing their complaints of discrimination within the department. T. 14-15; Ex. P-1, T. 14. The petition detailed the League's concerns and set forth employment statistics of racial

imbalance, alleged discrimination in hiring, promotions, assignments, and pointed to discrepancies in disciplinary practices with regard to white and black officers.[1] Again, this petition did not contain any direct criticism of specific departmental supervisors. This petition of grievances was presented to the public on April 5, 1971, when League officials held a press conference in the city commision chambers for this purpose. T. 15, 54; Ex. D-1, T. 53, 58-59.

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1. At the trial, Officer Leonard detailed the factual and documentary basis for the grievances set forth in the League's petition. T. 36-48, 107-09. The defendants admitted that the plaintiffs' employment statistics were essentially correct, T. 275-76, 298-99; that the disciplinary procedures needed modification and updating, T. 385-86; and that, according to petitioner Sargis, the Director of Public Safety, "it could be shown that for what appeared to be similar violations of rules, unequal sentencing was engaged in." T. 387.

At the time of the March 26 press release and the April 5 news conference, respondents were not informed that these actions violated department regulations; nor were they told that these actions would result in the bringing of charges or serve as a basis for dismissal. T. 108-09.

One of the League's primary complaints was that black officers were being subjected to discriminatory disciplinary treatment by the department. T. 131, 184, 205, 215. On May 29, 1971, John Brooks, an ill black patrolman, called in sick, knowing that under normal department practices the desk sergeant would arrange to reschedule the court cases at which Officer Brooks was to appear as a witness. T. 56, 64-65, 111. Instead, when Officer Brooks did not appear in court, he was charged with

contempt, and two officers were sent to his home to arrest him on those charges. T. 110. He was also suspended indefinitely on charges of conduct unbecoming an officer and feigning sickness to avoid duty. T. 342.

The respondents were unaware of any white officers who had been arrested for contempt or disciplined in this matter under similar circumstances. T. 16, 135-36, 185. After learning of Officer Brooks' arrest and trying unsuccessfully to confer with Chief McGuffey, T. 17, 158, 223, respondents and other black officers picketed the police station on May 29 and 30, 1971. T. 136, 158-59, 166-67. The picketing was peaceful and orderly at all times. T. 18. At no time were respondents advised that their picketing was unlawful or would result in their dismissal. T. 137.

On May 30, the black officers and various civic leaders met in an attempt to implement a 24-hour cooling-off period, with the understanding that the picketing would cease, no charges would be brought against the officers, and efforts would be made to deal with the grievances concerning the department. T. 18, 138-40. Black community leaders and Mayor Pro Tem McClung served as intermediaries, met with police officials at city hall, and emerged from the meeting with a statement that if the men stopped picketing, no charges would be brought and efforts would be made to resolve respondents' complaints. T. 137-40, 224-26.[1]

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1. Petitioner McClung claimed that he participated in those meetings not in his official capacity but as a private citizen, and that no promises were given other than that an effort would be made to work out some of the problems. T. 276-79.

Later that day, however, Officer Leonard was called off his beat and told to report to police headquarters. T. 19. When he arrived, the deputy chief read a list of charges which were to be brought against Mr. Leonard, but the deputy chief refused to give him a copy of those charges. T. 19, 144. Respondent John Clark, another League officer, was called in shortly thereafter and also orally presented various charges. T. 227, 240-41.

2. Removal of the American Flag Emblems

Believing that the charges threatened aginst the two League officers constituted a violation of the cooling-off period, the black police officers met on the morning of May 31 and decided to resume their protest against the police department. In the early after-

noon seven black officers, including the six respondents,[1] arrived in front of headquarters; the men were all off-duty but wore their police uniforms. T. 21, 228; Ex. D-2 to D-5, T. 59. They carried handlettered signs with statements such as: "We Don't Want To Be Policeboys; We Want To Be Policemen." Ibid. As before, the picketing was at all times peaceful and without incident. T. 21.

In mid-afternoon, with members of the press present, the respondents carefully assisted each other in removing the flag emblem from the sleeves of their uniforms. T. at 21, 147-49; Ex. D-2 to D-12, T. 59. The flags were removed carefully, thread by thread, with a

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1. The seventh officer was originally a plaintiff but withdrew shortly before trial. T. 4.

razor. At no time was the flag treated with disrespect; to the contrary, speaking for the other officers, Officer Leonard stated that they had no intention of degrading the American flag (under which most of them had served in Vietnam), that the flag symbolized liberty and justice for all, that black police officers were not receiving liberty or justice from the department, and that, until they did, they could not continue to wear the flag emblem.[1] A-5, A-6, T. 22-23, 163-65, 187, 248, 261. Respondents' removal of the flag was

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1. Respondents testified at trial that they hold deep respect for the flag as a symbol of equality and justice. T. 22-23, 187, 228-29. They stated that they had engaged in the act of removing the flag emblem as a symbolic gesture, a method of dramatizing, for the police department and the public generally, the fact that their grievances about conditions in the department were deeply felt and had not been responded to. T. at 61, 112-13, 148-49, 228, 257, 267.

accompanied by no violence, disorder, or disturbance; and the flags were in no way mutilated or defaced. T. 23, 147-49, 188, 300. In fact, Officer Leonard attempted to present the flag emblems to Deputy Chief Brown, but when he refused to accept them, T. 23, Leonard placed the emblems in his pocket. T. 65.

Immediately thereafter, Deputy Chief Brown had a discussion with Chief McGuffey, T. 351, who in turn discussed the matter with Safety Director Sargis and Mayor Allen, T. 297, 369. At this hastily called conference, the mayor, director of public safety and police chief made a joint decision to fire respondents. Ibid.

Respondents continued picketing until they were ordered into a police major's office and given letters dismissing them from the department. A-6.

The letters stated that the respondents were discharged, effective that date, for violating two portions of the police regulations ("conduct unbecoming an officer..." and acting "contrary to good order and discipline") "in that you did publicly remove the American flag emblem from the Columbus Police Uniform while picketing in front of Police Headquarters on May 31, 1971." A-6, A-7.

The removal of the flag emblem was the sole reason specified for the dismissals. Respondents were not fired for engaging in political activity in uniform--Columbus does not prohibit policemen from engaging in off-duty political activity in uniform. Nor were respondents charged with disobeying orders or insubordination, T. 458-60, although the police regulations contained such a provision. Among the factors considered

in the decision to dismiss the respondents was their involvement "in a number of public displays, pronouncements, press releases, alleging these abuses in the police department." T. 370.[1]

3. The Flag Patch and Its Purpose

The entirety of the flag rule promulgation is found in Columbus City

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1. The court of appeals observed that the method used to dismiss respondents violated procedural protections afforded police officers by local ordinances and department rules in that the dismissals were summarily carried out without a prior hearing before a then existing police hearing board. A-8. A few days after their dismissal, the respondents requested such hearings, which were held in mid-July; the board upheld the dismissals. Since the court of appeals decision was based on first amendment grounds, there was no need to consider whether the violation of these local procedures afforded an additional basis for invalidating the dismissals.

Council minutes of August 18, 1969:

> Mayor Allen stated that since Chief McGuffey was present, he would like to bring up [the] matter of flag patch to be worn on uniforms of police officers. He pointed out that this was being done in Macon with excellent results. Chief McGuffey concurred with Mayor Allen's recommendation. Mayor Allen moved that the flag patches be worn by police officers. Seconded by Commissioner Illges. All Commissioners voting yes.
>
> Ex. D-23, T. 445-46.

It is questionable that this resolution was ever promulgated as a police directive. A-7, n.2. But it is clear that at times emblems were not available, they were never checked for at squad inspections, T. 27-28, 153-55, 165, 167-68, 193-94, 229, 243, one respondent had to pin a flag emblem on his shirt in order to remove it, T. 256, pictures of the protest show a white officer without a flag emblem, T. 302, a number

of officers invariably were without the flag patch, A-16, and respondents were the first officers ever disciplined for a flag emblem violation, T. 29, 302.

Indeed, the police chief, McGuffey, conceded at trial that the flag emblem served no law enforcement interests such as safety or helping the public identify persons as officers, T. 305, and he agreed that the absence of flag emblems does not affect police performance. T. 316. Curiously, when respondents tried to ask the police chief, "What purpose was served by having the flag patch on the uniform?", counsel for the petitioners objected and the objection was sustained. T. 306. Later in the trial director of public safety, petitioner Sargis, was permitted to answer that same question. His response was that in Columbus the purpose "is

specific, it is not symbolic."

Q. What function did it serve?

A. Compliance with a resolution of the prior council of the City of Columbus, Georgia.

Q. That is the only reason for it?

A. Well, most department heads customarily try to comply with the resolutions and ordinances passed by the legislative body of the City of Columbus.

T. 395.

4. Proceedings Below

In mid-June, 1971, the respondents filed the instant action contending that their dismissals violated their first amendment rights, that the sections of the police manual under which they were dismissed were vague and overbroad, that the dismissals were violative of due process and the result of discriminatory enforcement violating their rights to equal protection and due process of law. In February, 1975, a three-day trial

was held.[1] The district court entered an opinion in April, 1975, refusing to decide those claims and, instead, dismissing the complaint on jurisdiction and abstention grounds. A-56 to A-70.

In May, 1977, that decision was reversed by the fifth circuit, 551 F.2d 974 (5th Cir. 1977), A-45 to A-55, and the case was remanded for a decision on the merits. In so doing, the court of appeals noted that although a full trial had already been held, the district court was free to "allow the record to be appropriately supplemented." A-55, n.6. After a rehearing en banc the

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1. The original complaint had been brought on behalf on 38 black police officers and sought equitable relief against the allegedly discriminatory employment practices of the police department. Only the claims involving respondents' discharge were pursued at trial.

panel decision was unanimously affirmed, 565 F.2d 957 (5th Cir. 1977). In 1979, this Court denied review, 443 U.S. 905 (1979), A-37 to A-44, and rehearing, 444 U.S. 887 (1979).

In January, 1981, both sides filed motions for judgment on the existing record, R. 423, 500. A year later the district judge wrote to counsel and indicated that the case was "ready for disposition on the merits." See 1a, infra. Shortly thereafter the district court entered its decision. The first amendment claim was rejected on the ground that respondents' removal of the American flag emblem "was a calculated show of contempt for the City authority and a demonstration of refusal to obey its lawful ordinances, rules and commands.... If this was only 'symbolic speech', then it might well be presumed

that punching the Police Chief in the nose would also be so regarded." A-26. As the court of appeals subsequently observed, "[t]he district judge decided the first amendment claim without reference to any case law and without citation to settled authority." A-11, n.4. The district judge also rejected respondents' due process and equal protection claims. A-26 to A-35.

The court of appeals reversed in a unanimous decision, per Judge Kravitch, holding that respondents' dismissals violated their first amendment right of free speech. A-1 to A-18. Employing the approach of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), the court easily found that the removal of the flag emblem was at least a motivating factor in the respondents' dismissal. A-11,

A-12. Next the court applied the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968) and Connick v. Myers, ___U.S.___, 103 S.Ct. 1684 (1983), to conclude that the activity was protected by the first amendment. A-12 to A-17. In so doing, the court found that the removal of the flag emblem was "akin to pure speech," that the speech involved public issues of the highest importance, and that, carefully balancing these speech interests against the municipal interests advanced in the record to justify the dismissals, the respondents' activities were constitutionally protected. A-13 to A-17.

SUMMARY OF ARGUMENT

In considering whether or not respondent police officers' removal of flag emblems from their uniforms was protected activity under the first amendment, the court of appeals properly considered the record in detail and applied the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968) and its progeny, including Connick v. Myers, ___U.S.___, 103 S.Ct. 1684 (1983). Given the strong interest in public employees commenting on matters of racial discrimination, and the petitioners' failure to establish any interest in enforcing the flag emblem, other than suppression of speech, the court of appeals found that the activity was protected. It then considered whether or not the record established

that the petitioners would have fired the respondents in the absence of the protected activity, as required by Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), and found the petitioners had failed in proof.

The court of appeals did not err in not discussing such cases as Kelley v. Johnson, 425 U.S. 238 (1976) and United States v. O'Brien, 391 U.S. 367 (1968); Kelley, because a rational relationship test would be an inappropriate standard in a first amendment case; and O'Brien because, inter alia, petitioners did not establish that they had any interest apart from suppressing free speech.

Petitioners arguments that they were denied an opportunity to show that they would have fired respondents despite the protected activity and that they should avoid liability because of immunity

fail on this record largely because petitioners failed to put on evidence and advance arguments when they had opportunities to do so.

No due process issue under Arnett v. Kennedy, 416 U.S. 134 (1974) is presented because the decision below rested on a violation of first amendment rights, not due process rights.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Petitioners attempt to create the impression of a court of appeals decision at odds with rulings of this

Court, in conflict with decisions of other circuits, and oblivious to petitioners' defenses. In fact, the decision below is firmly anchored in settled doctrine of this Court and properly applied those rules to the detailed record made by the respondents and largely unanswered by the petitioners. Any quarrels the petitioners may have are with the weakness of their proof and the indifference of their defense. In an area of law so informed by fact based, case-by-case balancing of the rights of government employees and the interests of municipal employers, a case where the lower court carefully measured the interests and struck the balance is surely an inappropriate occasion for plenary review.

I. The Court of Appeals Properly Applied the Balancing Test of Pickering v. Board of Education, 391 U.S. 563 (1968).

The basic question addressed by the court of appeals was whether the respondents' activities were protected under the first amendment. In Connick v. Myers, ___U.S.___, 103 S.Ct. 1684 (1983), this Court once again stressed that the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968), used to resolve that question, is one applied in an enormous variety of particularized factual situations involving critical statements by public employees. The court of appeals performed a careful and appropriate application of the Pickering balancing test, guided as well by this Court's recent decision in Connick v.

Myers.[1] The court of appeals, properly applying the Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), framework for the Pickering analysis, proceeded as follows.

1. Respondents were required to prove their speech was a substantial or motivating factor in the discharge. The court of appeals found, and no one has seriously disputed, that the flag incident caused the firings.

2. Respondents then had to prove that their speech was protected. Here the court of appeals applied the Pickering balancing test, discussing both (a) the interest of the employee in commenting on matters of public concern and (b) the employer's interest in

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1. Curiously the petition for writ of certiorari makes no mention of Connick v. Myers, this Court's most recent decision in the Pickering area.

promoting the efficiency of the public services it provides through its employees.

2a. The court of appeals found respondents' interest was heavily weighted in favor of being protected activity. First, the activity involved peaceful, respectful removal of an emblem which is frequently the focal point of freedom of expression.[1] Second,

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1. Petitioners refer to the Court's grant of review in Clark v. Community for Creative Non-Violence, No. 82-1998, cert. granted 104 S.Ct. 65 (1983), to justify review here. As Connick v. Myers pointed out, however, the intensely factual balancing test makes it inappropriate to lay down general standards. But whatever the Court may conclude with respect to sleeping in a national park as a statement of the homeless, the expression here is well within the ambit of first amendment recognition. "The Court for decades has recognized the communicative connotations of the use of flags." Spence v. State of Washington, 418 U.S. 405, 410 (1974). Indeed, even the Solicitor General in Clark concedes that flag cases "involve[] conduct that
FOOTNOTE CONT'D NEXT PAGE...

the speech was directed at a perception of racial discrimination by the police department, discrimination that affected not only the officers, but the community. Certainly the court was correct here. Connick v. Myers, supra, 103 S.Ct. at 1689; NAACP v. Claiborne Hardware Co., ___U.S.___, 102 S.Ct. 3409, 3426 (1982); Givhan v. Western Line Consolidated Sch. Dist., 439 U.S. 410 (1979). Indeed, the Connick Court, in discussing Givhan, made it plain that employees' statements concerning racial discrimination in a municipal agency are matters "inherently of public concern" in the Pickering calculus. 103 S.Ct. at 1691, n.8.

FOOTNOTE CONT'D...

[is] inherently expressive." No. 82-1998, Brief for the Petitioners, 21. Moreover, Clark involves the government claimed interests in managing competing uses of a national park, concerns different from the asserted municipal interests considered below.

Third, the fact that police officers are involved does not water down their rights, citing Garrity v. New Jersey, 385 U.S. 493 (1967). A-13 to A-15.[1]

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1. Petitioner's first reason for granting certiorari is that the court of appeals overlooked this Court's decision in Kelley v. Johnson, 425 U.S. 238 (1976). Characteristically, the petitioners, who now claim Kelley is pivotal to the issues in this case, failed even to cite that decision in their brief to the court of appeals. Only after that court ruled against them did the petitioners discover Kelley and refer to it in a petition for rehearing.

In any event, Kelley v. Johnson, which applied a rational relationship test to a policeman's claimed general liberty interest in his hairstyle, is inapposite to a police officer's claim under the first amendment. See Pienta v. Village of Schaumburg, 710 F.2d 1258 (7th Cir. 1983). In Elrod v. Burns, 427 U.S. 347 (1976), decided shortly after Kelley, this Court applied heightened standards to judge the first amendment claims of law enforcement employees.

2b. In examining the petitioners' interest in suppressing the speech, the court of appeals looked beneath the veneer of the "paramilitary" argument, to ascertain "the true interest the Department has in suppressing the speech ..." A-15. It found that the evidence showed that the flag ruled "required a flag patch on the sleeve of a police uniform, it did nothing more and nothing less," A-16, having "no relation to the efficient performance of police duties," ibid, according to the petitioners' own testimony. The court found further that if adherence to a council resolution is used to suppress constitutional activity, there must be an interest apart from the resolution. A-15. However, since the "[u]ncontroverted evidence at trial indicated that a number of police officers invariably were without the

flag patch," A-16, petitioners failed there as well. The court concluded the Pickering balance as follows:

> Weighing the strong interest of appellants in speaking on a matter of public importance against the interest of the City in having the flag worn on the uniform, an interest no City official showed concern for until these black officers took the patch off, we can only conclude the speech was protected.
>
> A-17.

Finally, the petitioners complain that the court of appeals failed to apply United States v. O'Brien, 391 U.S. 367 (1968). Two responses are in order. First, in one sense, this is basically not an O'Brien case: rather the communicative activity here is well within the mainstream of this Court's symbolic speech cases. See, Wooley v. Maynard, 430 U.S. 705 (1977); Spence v. Washington, supra; Tinker v. Des Moines

School District, 393 U.S. 503 (1969); West Virginia State Board of Ed. v. Barnette, 319 U.S. 624 (1943); Stromberg v. California, 283 U.S. 359 (1931).

But second, even if O'Brien is relevant, petitioners recite its four-part test but utterly fail to suggest how the record might conceivably be interpreted to show they meet the test. Indeed, in significant ways, application of the O'Brien tests is performed in the course of striking the Pickering balance. The court below did assess whether enforcement of the flag emblem requirement furthered "an important or substantial governmental interest," "unrelated to the suppression of free expression," 391 U.S. at 377. The court found that the petitioners failed in proof that their rule furthered any underlying interest, much less an important or substantial one. Moreover, based on the record, the petitioners were found to

have enforced the rule in order to suppress free expression. A-17. Thus, even under the O'Brien approach, the petitioners fare no better than they did under the Pickering test.

In short, the court of appeals, carefully following the prescribed procedure, thoroughly assessing the factual setting shown in the record and the evidence bearing on the petitioners' justifications, correctly applied the Pickering balancing test to conclude that the respondents' activity was protected by the first amendment. There is nothing here that merits plenary review.

II. The Petitioners Had Ample Opportunity to Comply With Mt. Healthy, Even Years After That Decision, But Simply Failed To Do So.

Once the respondents established their claim under Pickering, the court

of appeals then properly addressed whether petitioners had met their burden, as Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 (1977), requires, of showing by a preponderance of the evidence that the firings would have occurred even in the absence of the protected conduct. The court found that petitioners had entirely failed to meet that burden, and accordingly reversed and remanded for an appropriate remedy.

The petitioners claim now that because this case was tried in 1975, they were unfairly saddled with the burden of proving they would have fired respondents despite the latter's first amendment activity, a burden made specific two years subsequent to the trial by the Mt. Healthy decision. Petition, 23-25.[1]

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1. Petitioners additionally suggest, in the editorial comment following
FOOTNOTE CONT'D NEXT PAGE...

Petitioners' argument has no merit. They had ample opportunity after the Mt. Healthy decision to supplement the record and elected not to do so. The court of appeals in remanding the case in 1977 for decision took care to note that although a full trial had already been held, the district court was free to "allow the record to be appropriately supplemented."

FOOTNOTE CONT'D...

their fourth question presented, Petition, iii-iv, that a defendant should only be subject to burden shifting after "defendants' lawyer knows of the rule and defendants' lawyer knows that a trial judge has ruled that a First Amendment violation has occurred (e.g., by denying a motion for directed verdict or a motion for summary dismissal)..." Ibid. (Emphasis original). However convenient that might be for defense counsel, when a successful defense might depend upon putting on evidence in rebuttal or of an affirmative defense, a defense attorney who rests his case without putting on the evidence does so at risk.

The petitioners made no motion for a directed verdict or any similar motion either at the close of plaintiffs' case or at the close of all evidence. To follow their suggestion would be to encourage piecemeal litigation.

A-55, n.6. This Court denied the petitioners' previous petition for writ of certiorari on June 25, 1979. Thus when the case returned to the district court, two years had elapsed since the Mt. Healthy decision. Six months had elapsed since the Givhan v. Western Line Consol. Sch. Dist., supra, decision, which elaborated on the Mt. Healthy approach. Four years after Mt. Healthy the parties each moved for judgment on the existing record, and five years after Mt. Healthy the district judge notified the parties he was ready to decide the merits. Supra, 19. Thus petitioners, who ask this Court to provide them an opportunity to offer evidence subsequent to the Mt. Healthy decision, have already had--and waived--such an opportunity.

Petitioners defended in trial and

appellate court on their theory that respondents were fired for removing the flag patches and that such action was not protected activity. Having lost on that line of defense they now argue they are unfairly denied an opportunity to prove a fall back defense. Not only were they not unfairly denied an opportunity to prove another defense, they were not denied the opportunity at all. They simply failed to put on their proof when they had the two opportunities, at trial and after remand, to do so.

Accordingly, there is no reason to issue a writ of certiorari to consider any issues relating to the Mt. Healthy and Givhan rules.

III. Given the Posture of this Case and the Evidence in This Record, None of the Other Points Raised in the Petition Warrants Review.

A. No Issues Concerning Arnett v. Kennedy, 416 U.S. 134 (1974), are Presented in this Case.

The petitioners argue that the court of appeals should have applied Arnett v. Kennedy, 416 U.S. 134 (1974), to hold that any procedural violations accompanying respondents' dismissals were cured by the post-dismissal hearings before the police hearing board. The response to this is simple. The decision below was based solely on the violation of respondents' first amendment rights. Although the court of appeals observed that the petitioners had committed wholesale violations of their own procedures in carrying out the dismissals, the court did not need to base its decision on any due process grounds. Whether or not a post-termination hearing can remedy a prior procedural flaw, it surely cannot

remedy a substantive denial of first amendment rights.[1]

B. Petitioners Failed to Establish a Defense of Good Faith.

Good faith is, of course, an affirmative defense which must be pleaded and proved. There is no doubt as to the city's liability for a decision made jointly by the mayor, director of public safety, and police chief and ratified by a hearing board. Owen v. City of Independence, 445 U.S. 622 (1980). Petitioners suggest they are in a dilemma because the district court never reached

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1. While respondents have pressed due process claims as additional grounds for invalidating their dismissals and would continue to do so if review were granted, the opinion below was not based on such grounds. Consequently unlike other cases which the Court has before it, e.g., Davis v. Scherer, prob. juris. noted 52 L.W. 3460 (No. 83-490, Dec. 12, 1983); Bd. of Ed. of Paris Union Sch. Dist. No. 95 v. Vail cert. granted, 104 S.Ct. 66 (1983), no issue regarding due process is presented by the petition in this case.

good faith defenses, and the court of appeals reversed without discussing such defenses.

While petitioners were allowed to amend their answer to raise their affirmative defense, R.388, they again failed to prove their position. Six respondents testified. None were asked questions that would have established a good faith defense. Indeed the opposite happened.

When police hearing board member and petitioner Leonard Leavell was on the stand, he was being questioned about one of the letters in which respondent was notified that his dismissal was upheld by a four to two vote. If petitioner Leavell had dissented or made certain comments during the deliberations these matters might have established his good faith. But his own lawyer objected. T. 427. Consequently, neither the breakdown of

the vote or the board's deliberations were allowed into evidence. T. 427-28.

While the district court made no findings regarding good faith, petitioners were not prohibited from pressing this defense in the court of appeals. It is axiomatic that they could defend a judgment on any ground appearing in the record. Le Tulle v. Scofield, 308 U.S. 415, 421 (1940). It is not surprising that they did not persuade the court of appeals of their position because their first mention of their defense came in passing in the conclusion of their brief to that court. Brief of Defendants-Appellees, (No. 82-8158, 11th Cir.) p. 42.

As with their Mt. Healthy point, the petitioners' plaint here is essentially an attempt to be relieved of their own indifference to establishing their defenses. On such a record plenary review is not required.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari is without merit and should be denied.

Respectfully submitted,

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RE: Robert Leonard, et al. v.
The City of Columbus, C.A.
1514, Columbus

Gentlemen:

As was noted in your recent letters to me, it appears that the case above identified is ready for disposition on the merits. During the last three days I have spent several hours reviewing this rather voluminous file and I expect to begin work on the draft of an opinion the first of next week. Because it is going to be necessary for me to be in court a large part of the week I will probably not be able to finish the opinion before the week is out, but I hope that I will